S. HRG. 99-978

NEWSPAPER PRESERVATION ACT

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-NINTH CONGRESS

SECOND SESSION

ON

S. 2314

A BILL TO AMEND THE NEWSPAPER PRESERVATION ACT

JUNE 10, 1986

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NEWSPAPER PRESERVATION ACT—S. 2314

TUESDAY, JUNE 10, 1986

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, subject to notice, at 10 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Orrin G. Hatch (acting chairman) presiding.

Also present: Senators Grassley, Specter, McConnell, Metzenbaum, DeConcini, and Simon.

Staff present: Kenneth Starling, chief antitrust counsel; Randall Rader, subcommittee chief counsel and staff director; Chris Dunn, minority counsel; Bob Feidler, minority counsel, Eddie Correia, minority counsel; and Alice Milder, counsel.

OPENING STATEMENT OF SENATOR ORRIN G. HATCH

Senator HATCH. The hearing will come to order.

The 1970 Newspaper Preservation Act provides an antitrust exemption for newspapers which combine their production, circulation, and advertising functions while maintaining separate editorial and reporting functions. The act thus preserves two separate and distinct news voices in cities which could not otherwise provide more than one newspaper with a sound financial base. This objective is achieved by permitting newspapers to join their commercial functions under joint operating agreements.

These JOA's have served their purpose well. The number of cities with commercially competitive newspapers has declined from well over 600 in 1909 to 45 in 1970 to 23 today. In fact, in the 30 largest markets, only 4 cities are supporting more than one profitable newspaper.

Despite a decade and a half of unrest for this vital news institution, JOA's have successfully maintained a diversity in the marketplace of ideas. In 1970, there were 22 cities with joint newspaper operating agreements. Today there are 21 JOA's in place. The National Newspaper act has operated well to ensure that competition in the commercial marketplace does not stifle competition in the marketplace of ideas.

In the 15 years since enactment of the act, however, the newspaper publishing business has changed markedly. This necessitates an updating of the Newspaper Preservation Act.

For instance, the act currently defines a "newspaper publication" which may enter into a joint operating agreement as "a publication printed on newsprint paper." That definition was undoubtedly sufficient to encompass newspaper activities in 1970, but

today's technology permits printing on "slick" paper. Advertisers often demand that their products appear on this improved resolution paper. The confining definition of the Newspaper Preservation Act needs to be brought into the present.

Marketing strategies have also evolved. In response to changing demographics and consumer demand, some or all of a newspaper may be provided to all readers in a given area under a technique known as total market coverage or TMC. Ambiguities in the language of the act, which talks of "subscribers" rather than "readers" have clouded the availability of this standard newspaper practice for today's JOA's. Moreover, even more advances in technology and marketing loom on the horizon, such as electronic delivery through cable television to an in-home printing facility. The act should, it seems to me, responsibly take these matters into consideration and into account as well.

These ambiguities and anachronisms effectively chill the joint operating agreements in their commercial endeavors. Not only must a joint operating agreement fear criminal prosecution if it guesses wrong on some business activity, but it also faces the threat of treble damage liability, and that is a chilling threat. With these enormous consequences at stake, Congress owes it to the newspaper publishers and their advertisers and readers to clarify and update the act and modernize it.

The basic principle of the National Newspaper Act that JOA newspapers ought to be able to engage in the same standard business practices employed by any single newspaper remains the objective of this clarifying and updating amendment. The committee does look forward to the testimony today on the merits of S. 2314.

At this particular point we will put the statement of the distinguished chairman of the committee, Senator Thurmond of South Carolina, in the record, and also a copy of S. 2314.

[The aforementioned follows:]

PREPARED STATEMENT OF CHAIRMAN STROM THURMOND

The Committee is meeting today to hear testimony on a bill introduced by our distinguished colleague, Senator Hatch. The bill proposes to clarify the scope of the Newspaper Preservation Act, which is a limited antitrust exemption enacted in 1970 for the purpose of preserving multiple editorial voices in communities that could not otherwise support two newspapers. As I understand it, the bill before us is intended to address a problem encountered by those newspaper companies operating under the Preservation Act. Our witnesses today will provide their views regarding the scope of the Act—that is, which activities are covered and which are not. We will also be receiving the written views of the Administration on the bill, especially the Department of Justice which has the responsibility for administering the Newspaper Preservation Act.

I appreciate the testimony of our witnesses and I will review their statements with great interest.

II

99TH CONGRESS
2D SESSION

S. 2314

To amend the Newspaper Preservation Act.

IN THE SENATE OF THE UNITED STATES

APRIL 16 (legislative day, APRIL 8), 1986

Mr. HATCH (for himself, Mr. GARN, and Mr. INOUYE) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To amend the Newspaper Preservation Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 3(4) of the Newspaper Preservation Act (15 U.S.C. 1802(4)), is amended by—

(i) striking out "on newsprint paper which is published"; and

(ii) striking out "and in which" and inserting in lieu thereof "and delivered in whole or in part to readers and in which whole publication,".

SEC. 2. Section 4(c) of the Newspaper Preservation Act (15 U.S.C. 1803(c)), is amended by—

(1) striking out "the Act" in the first sentence and inserting in lieu thereof "this Act"; and

(2) inserting between the first and second sentences the following: "Nor shall anything in this Act be construed to make unlawful under any antitrust law any activity undertaken by a party to a joint newspaper operating agreement in connection with a newspaper publication that could be engaged in lawfully if such person were not a party to such an arrangement.".

Senator HATCH. We are very delighted to have the distinguished Senator from Hawaii, Senator Dan Inouye, here this morning. He has been a leader in this area and certainly a person with whom I am very happy to affiliate in the fight for these changes. We will take your testimony at this time.

STATEMENT OF THE HON. DANIEL K. INOUYE, A U.S. SENATOR FROM THE STATE OF HAWAII

Senator INOUYE. Thank you very much, Mr. Chairman.

Mr. Chairman, I appear before this committee as a cosponsor of your bill, S. 2314, a bill to amend the Newspaper Preservation Act. I am pleased to state that I was also a sponsor of the Newspaper Preservation Act and worked with many of my colleagues toward its enactment in 1970.

Before discussing the history of the Newspaper Preservation Act, let me note for the record that this act has been effective, as the Congress had intended, in preserving two independent and competing newspaper voices in cities where only one newspaper could commercially survive. Therefore, our amendment is not intended to change the basic structure of the act, to tamper with success, so to speak, but to make basically technical amendments to the act which fully conform to congressional intent in enacting this legislation.

Simply, because of ambiguities and questions raised in court decisions, we have to make explicit that which is implicit in the act, and to conform the legislation to the technological changes in newspaper production and marketing which have occurred since 1970.

If I may, I would like to briefly relate the history underlying the Newspaper Preservation Act. During the depression years, full competition between newspapers in a great many cities came to a halt, as more and more newspapers had to close down for economic reasons. The two publishers in Albuquerque, NM, were faced with a like situation in 1933, when they agreed to a novel arrangement. Instead of one paper folding or being bought out by the other, the two newspapers entered into a commercial merger, but each agreed to provide a separate news and editorial product. Thus, there were still morning and afternoon newspapers, with independent voices, even though there was only one commercial operation. This joint operating agreement, referred to generally as a JOA, was successful in saving two newspaper voices in Albuquerque.

Thereafter, while the diminution in the number of newspaper voices continued, publishers in a number of other cities entered JOA's, to preserve their two voices. This happened in my home city of Honolulu, where otherwise the Honolulu Advertiser would surely have gone out of business. And, as my colleague well knows, a JOA was formed in Salt Lake City, and, among others, in Birmingham, AL, in Charleston, WV, in Pittsburgh, PA, and in Tucson, AZ. By 1964, there were 22 cities where there were joint operating agreements.

Now, while the Department of Justice was well aware of these JOA's and had given tacit approval to them, never previously having challenged the legitimacy of a JOA, it did bring an action

against the Tucson JOA. This resulted in a decision by the Supreme Court, in *Citizen Publishing Company* v. *United States*, 393 U.S. 131 (1969). The Supreme Court found that the JOA in Tucson, and, by implication, all other JOA's, were in violation of the Sherman Act.

Congress, balancing the importance of first amendment principles against the reach of the antitrust laws, determined that JOA's should be protected in order to continue to preserve separate newspaper voices in each of the cities involved.

After extremely full and expansive hearings in both this committee and in the House Judiciary Committee, Congress enacted the Newspaper Preservation Act in 1970. I believe that it is worth recalling for the committee the voting margins. In the Senate, the vote was 64 to 13, and in the House it was 292 to 87.

The Newspaper Preservation Act grandfathered the existing JOA's, as long as at least one of the newspapers was failing at the time it entered into the JOA, and it also provided for future JOA's, subject to application to and approval by the Attorney General. While there were, we thought, 22 JOA's at the time of enactment, the one in Bristol, TN and Bristol, VA, were really a one-owner situation. Thus, there were, in 1970, 21 JOA's. Of these, 18 still exist. In addition, new JOA's have been formed in three cities, with the approval of the Attorney General.

I find this to be demonstrative of the effectiveness of the Newspaper Preservation Act, and fulfilling the intent of Congress in preserving newspaper voices. We all know of the many, many newspapers which have closed down since 1970, simply gone out of business. Sadly, the economic facts are such that, contrary to arguments which have been made in the past, there has not been a successful replacement of a closed newspaper in any metropolitan area.

The economics of newspaper production have foreclosed replacing one newspaper voice with a new voice. That is why we enacted the Newspaper Preservation Act, and that is why it is so important that we adopt S. 2314 and make the technical amendments which will allow that act to maintain its vitality.

Very simply, we did not anticipate in 1970 the technological changes which would occur in publishing. While the Newspaper Preservation Act states that a newspaper in a JOA must be published on newsprint, in the last several years better resolution paper or slick paper has become the norm for many sections of the newspaper. That is fine for the 1,500-plus daily newspapers that are not in JOA's, but for the 40 JOA newspapers it presents a major problem.

Similarly, we are at a stage in electronic publishing where a section, article, or even paragraph of a newspaper can be called up on a computer, and be recorded on a printout, not newsprint, but still be a newspaper. Members of JOA's should not be foreclosed from these technologies, since everyone else may employ them. In enacting the Newspaper Preservation Act, we recognized a JOA as a commercial merger and did not relegate their publishers to the position of second-class citizens among all newspaper publishers.

Mr. Chairman, the proposed amendments to the Newspaper Preservation Act contained in your bill, S. 2314, do not expand the

antitrust exemption already granted, nor do they provide any blanket immunity from the reach of the antitrust laws.

The law now states in plain language that a newspaper in a JOA cannot do something that would be unlawful if done by a single entity newspaper owner, and your bill, S. 2314, would make it clear that it can do such things as a part of a JOA that it could do were it not in a JOA.

I hope that the committee will give its early attention to this bill and order it reported favorably to the Senate.

I thank you very much.

[The prepared statement of Senator Inouye follows:]

news from
Senator DANIEL K. INOUYE

topic: S. 2314, A BILL TO AMEND THE NEWSPAPER PRESERVATION ACT

date: June 10, 1986, Before the Senate Committee on the Judiciary, Washington, D.C.

release date: FOR IMMEDIATE RELEASE

Mr. Chairman, I appear before the Committee today as a co-sponsor of S. 2314, a bill to amend the Newspaper Preservation Act. I am pleased to state that I was also a sponsor of the Newspaper Preservation Act, and worked with many of my colleagues toward its enactment in 1970.

Before discussing the history of the Newspaper Preservation Act, let me note for the record that this Act has been effective, as the Congress had intended, in preserving two independent and competing newspapers voices in cities where only one newspaper could commercially survive. Therefore, our amendment is not intended to change the basic structure of the Act, to tamper with success, so to speak, but to make basically technical amendments to the Act which fully conform to Congressional intent in enacting this legislation. Simply, because of ambiguities and questions raised in Court decisions, we have to make explicit that which is implicit in the Act, and to conform the legislation to the technological changes in newspaper production and marketing which have occurred since 1970.

If I may, I would like to briefly relate the history underlying the Newspaper Preservation Act. During the depression years, full competition between newspapers in a great many cities came to a halt, as more and more newspapers had to close down for economic reasons. The two publishers in Albuquerque, New Mexico, were faced with a like situation in 1933, when they agreed to a novel arrangement. Instead of one paper folding, or being bought out by the other, the two newspapers entered into a commercial merger, but each agreed to provide a separate news and editorial product. Thus, there were still morning and afternoon newspapers, with independent voices, even though there was only one commercial operation. This joint operating agreement, referred to generally as a JOA, was successful in saving two newspaper voices in Albuquerque.

Thereafter, while the diminution in the number of newspaper voices continued, publishers in a number of other cities entered JOAs, to preserve their two voices. This happened in my home city of Honolulu--where, otherwise, the Honolulu Advertiser would surely have gone out of business. And, as my colleague well knows, a JOA was formed in Salt Lake City, and, among others, in Birmingham, AL, in Charleston, WV, in Pittsburgh, PA, and in Tucson, AZ. By 1964, there were 22 cities where there were Joint Operating Agreements.

Now, while the Department of Justice

was well aware of these JOAs, and had given tacit approval to them, never previously having challenged the legitimacy of a JOA, it did bring an action against the Tucson JOA. This resulted in a decision by the Supreme Court, in Citizen Publishing Co. v. United States, 393 U.S. 131 (1969). The Supreme Court found that the JOA in Tucson, and, by implication, all other JOAs, were in violation of the Sherman Act.

Congress, balancing the importance of First Amendment principles against the reach of the antitrust laws, determined that JOAs should be protected in order to continue to preserve separate newspapers voices in each of the cities involved. After extremely full and expansive hearings in both this Committee and in the House Judiciary Committee, Congress enacted the Newspaper Preservation Act in 1970. I believe that it is worth recalling for the Committee the voting margins. In the Senate the vote was 64 to 13, and in the House it was 292 to 87.

The Newspaper Preservation Act grandfathered the existing JOAs, as long as at least one of the newspapers was failing at the time it entered into the JOA, and it also provided for future JOAs, subject to application to and approval by the Attorney General. While there were, we thought, 22 JOAs at the time of enactment, the one in Bristol, Tennessee and Bristol, Virginia, were really a one owner situation. Thus there were, in 1970, 21 JOAs. Of these, 18 still exist. In addition, new JOAs have been formed in three cities, with the approval of the Attorney General.

I find this to be demonstrative of the effectiveness of the Newspaper Preservation Act, and fulfilling the intent of Congress in preserving newspaper voices. We all know of the many, many newspapers which have closed down since 1970, simply gone out of business. Sadly, the economic facts are such that, contrary to arguments which have been made in the past, there has not been a successful replacement of a closed newspaper in any metropolitan area. The economics of newspaper production have foreclosed replacing one newspaper voice with a new voice. That is why we enacted the Newspaper Preservation Act, and that is why it is so important that we adopt S. 2314, and make the technical amendments which will allow that Act to maintain its vitality.

Very simply, we did not anticipate in 1970 the technological changes which would occur in publishing. While the Newspaper Preservation Act states that a newspaper in a JOA must be published on newsprint, in the last several years, better resolution paper, or slick paper, has become the norm for many sections of a newspaper. That is fine for the fifteen hundred plus daily newspapers that are not in JOAs, but for the forty JOA newspapers it presents a major problem. Similarly, we are at a stage in electronic publishing where a section, article, or even paragraph of a newspaper can be called up on a computer, and be recorded on a print-out, not newsprint, but still be a newspaper. Members of JOAs should not be foreclosed from these technologies, since everyone else may employ them. In enacting the Newspaper Preservation Act, we recognized a JOA as a commercial merger, and did not relegate their publishers to the position of second class citizens among all newspaper publishers.

Further, in marketing, there have been major changes in the newspaper publishing industry. Something called total market coverage, or TMC, has become the norm. That is where an advertiser, or

advertisers, request that a newspaper deliver its advertisements to every home in a city, county, or postal zone. This is common practice throughout the newspaper publishing industry, for daily and weekly newspapers. However, the legitimacy of JOAs engaging in TMC marketing has been questioned in a recent case - again in Tucson - called Wick v. Tucson Newspapers. I have here a copy of the Court's decisions in that case which I request be made a part of the Record.

Mr. Chairman, the proposed amendments to the Newspaper Preservation Act, contained in S. 2314, do not expand the antitrust exemption already granted, nor do they provide any blanket immunity from the reach of the antitrust laws. The law now states, in plain language, that a newspaper in a JOA cannot do something that would be unlawful if done by a single entity newspaper owner, and S. 2314 would make it clear that it can do such things as a part of a JOA that it could do were it not in a JOA.

I would hope that the Committee will give its early attention to S. 2314, and order it reported favorably to the Senate.

Senator HATCH. Thank you, Senator. We appreciate your testimony and support of this bill.

Senator INOUYE. Thank you very much.

Mr. Chairman, before leaving I ask unanimous consent that a statement of Mr. Thurston Twigg-Smith, president and chief executive officer of the Honolulu Advertiser, be made part of the record. Mr. Twigg-Smith regrets he cannot be here.

Senator HATCH. Without objection, we will put it in the record at this point.

[The prepared statement of Mr. Twigg-Smith follows:]

STATEMENT OF
THURSTON TWIGG-SMITH
PRESIDENT AND CHIEF EXECUTIVE
THE HONOLULU ADVERTISER

S. 2314

SENATE COMMITTEE OF THE JUDICIARY
JUNE 10, 1986

Mr. Chairman, and members of the Senate Committee on the Judiciary, I am offering this statement in support of S. 2314. I regret that I am unable to attend today's hearing, but understand that this statement will be made a part of the record on this bill to amend the Newspaper Preservation Act.

I am the President and Chief Executive Officer of The Honolulu Advertiser. The Advertiser is the morning newspaper serving Honolulu, as well as the entire State of Hawaii. The Advertiser and the Honolulu Star-Bulletin, the afternoon newspaper in Honolulu, presently owned by Gannett Newspapers, are part of a joint newspaper operating agreement, or JOA. Our JOA was formed in 1962, at a time when the Honolulu Advertiser was clearly a failing newspaper - we had sustained losses over several years, and were without adequate resources to continue our publication. The then owner of the Star-Bulletin joined with us, at our request, in forming a JOA.

In Honolulu, the Hawaii Newspaper Agency, Inc., owned by the Star-Bulletin and the Advertiser, conducts all of the commercial operations for both newspapers. It buys all of the supplies for production of the newspapers, and employs all of the personnel engaged in the printing, sales and circulation departments. As such, the Hawaii Newspaper Agency, Inc., is the result of a merger of all of the commercial operations of the Advertiser and the Star-Bulletin.

The Advertiser and the Star-Bulletin continued to compete, and compete vigorously, in their reportorial and editorial products. Our editorial and reportorial staffs are truly independent, each with its own product, which comprises the newshole of each newspaper. I should also add that the Honolulu Advertiser has an Employee Stock Ownership Plan (ESOP), which owns approximately thirty percent (30%) of the Honolulu Advertiser, Inc.

Had we not entered our JOA in 1962, and if the Congress had not recognized the legitimacy of such operations in the Newspaper Preservation Act in 1970, there is no doubt in my mind that there would be only one

metropolitan daily newspaper in Hawaii today. The savings accomplished through our commercial merger have enabled us to continue the two diverse voices represented by the Advertiser and the Star-Bulletin. We are truly appreciative of the action taken by the Congress in enacting the Newspaper Preservation Act some sixteen years ago.

The maintenance of two newspaper voices in Honolulu is really quite remarkable, when one considers the diminution in the number of cities with two newspapers, or even cities where one owner has morning and afternoon newspapers. In the last sixteen years, since the Newspaper Preservation Act became law, there have been so many daily newspapers which have gone out of business, over one-hundred by my count, and each such closing has stilled an editorial voice.

As important as the Act was and is in saving newspaper voices, we now find ourselves in need of technical or clarifying amendments to the Act. This is because of the significant changes in newspaper publishing which have occurred in the past sixteen years - changes in technology and in marketing. Competition has also increased significantly. Advertising, circulation and marketing practices which are common and unchallenged when done by one-owner newspapers, have been challenged when practiced by JOA newspapers.

While we believe these practices may lawfully be engaged in by JOA newspapers, pursuant to the clear intent of the Congress in the Newspaper Preservation Act, they have been challenged in Court by our competitors, and with negative results for JOA publishers. We do believe that we would ultimately prevail in such litigation, but the costs of such litigation are awesome. We had antitrust litigation against our JOA in Honolulu just a few years ago, and, although we prevailed, the cost just to my newspaper was stunning, well in excess of one million dollars. A few more such victories could put us back into a failing condition.

Our understanding of the Newspaper Preservation Act is that it places us on a par with other one-owner newspapers. We certainly cannot engage in practices which are illegal for a one-owner newspaper. However, the Congress having recognized a JOA as a commercial merger, it would appear to be the intent of the Newspaper Preservation Act that a publisher in a JOA can undertake any activity which it could engage in lawfully if it were not a party to a JOA. The language of S. 2314 would make this explicit.

S. 2314 would also relieve the newspapers in a JOA from what seems to be a restriction requiring that all of a JOA newspaper be printed on newsprint. New better resolution papers, of a slicker finish, not technically newsprint, is now in common use among all newspapers. To the extent that the present language of the Act requires use of newsprint by JOAs, that should be clarified or corrected, as set forth in S. 2314.

I feel that S. 2314, by technically amending the Newspaper Preservation Act, would confirm the Congressional intent in passing the Act. I urge the Committee to give this bill your favorable consideration.

Senator HATCH. Do you have any questions, Senator Simon?

Senator SIMON. I do not. I would add that I have not had a chance to examine this bill in detail. I do think we ought to be doing as much as we can to encourage diversity of newspaper ownership and whatever strengthens that seems to me to be clearly in the national interest. I am pleased to be here with my colleague who was in the city of Chicago just recently and, as far as I know, behaved himself in exemplary fashion while he was there. [Laughter.]

Senator INOUYE. Mr. Chairman, I am pleased to hear the views of my distinguished colleague from Illinois. I would like to repeat once again that were it not for this Newspaper Preservation Act, Honolulu would have one paper, that is clear. And so it is of personal concern to me and I think it is of national concern to the United States Senate.

Thank you very much.

Senator HATCH. Thank you, Senator Inouye.

We will now move to our first panel. We are delighted to have a number of top people from around the country at our hearing this morning. I am especially pleased that William James Mortimer, publisher of the Deseret News in Salt Lake City, UT.

Jack Gallivan, owner of the Salt Lake Tribune, is here this morning. Jack is accompanied by Jerry O'Brien, who is publisher of the Salt Lake Tribune. Jerry, we would love to have you at the table if you would care to be there.

We also have Howard G. Barnett, Jr., executive vice president of Tribune/Swab Fox Companies, Inc., of Tulsa, OK; and Richard Thieriot, editor and publisher of the San Francisco Chronicle, of San Francisco, CA.

We are delighted to welcome all of you here today. We look forward to hearing your testimony. Jim, we will take your testimony first.

We would like to limit each of your remarks to 5 minutes. We will put all of your statements in the record as though fully delivered. I do have a number of questions for each of you. I suspect that other Senators will have questions as well.

We will begin with Mr. Mortimer.

PANEL CONSISTING OF JOHN W. GALLIVAN, PUBLISHER, SALT LAKE TRIBUNE, ACCOMPANIED BY DON HOLBROOK, COUNSEL; WILLIAM JAMES MORTIMER, PUBLISHER, DESERET NEWS; HOWARD G. BARNETT, JR., EXECUTIVE VICE PRESIDENT, TULSA TRIBUNE CO.; AND RICHARD THIERIOT, EDITOR AND PUBLISHER, SAN FRANCISCO CHRONICLE

Mr. MORTIMER. Mr. Chairman, could I defer to my colleague, Jack Gallivan, from the Salt Lake Tribune, who is prepared to make a broad introduction of what we are doing, and I might follow up his testimony.

Senator HATCH. That would be fine.

Mr. GALLIVAN. Thank you, Jim. Thank you, Senator, and Senator Simon, Senator DeConcini.

Please excuse my laryngitis. If it gets too bad, I will pass the ball to my colleagues.

Nineteen years ago, representatives of joint operating agreement publishers testified before your Subcommittee on Antitrust. Several representatives of those same JOA's are seated here today.

Senator Thurmond and Senator Kennedy are I believe the only members of the Judiciary Committee who were also members those many years ago. Those two Senators are still members by virtue of their continuing popularity among their constituency.

We publishers present are still here for the same reason, but half of us publishers would not have no constituency had not your honorable committee guided into being the Newspaper Preservation Act of 1970.

You will recall, in 1969 the Supreme Court upheld a lower court decision which found the 1940 joint operating agreement of Tucson newspapers to be in per se violation of section 1 of the Sherman Act. The Supreme Court ordered this solution of the Tucson JOA and articulated standards for the failing company defense that would have effectively put an end to all joint operating agreements.

By 1970, it was dramatically apparent that two newspapers could not survive profitably in any market except the largest. Now, in 1986, there is at least one failing newspaper or one likely to fail in every separate plant competitive market, regardless of size.

In 1970, there were 45 cities with competing dailies. Today there are 29. I should correct that. The demise last month of Baltimore's 212-year-old News American makes it 28 that survived in competition.

Your committee, in 1970, recognized that two newspapers could survive in any two newspaper market only in one plant, with one commercial payroll and a joint advertising rate card. You wanted two newspaper voices to survive in the then 21 joint operating agreement cities and any other cities that might later qualify for Newspaper Preservation Act privileges and rights. These rights are

the same legal rights that have always existed in the many more markets with two newspapers under one ownership.

In 1970, there were 150 such ownerships compared to the then 21 JOA's. I might note that the 150 ownerships that sought 2 newspapers in 1 plant and one ownership have dwindled now to 84.

Under the aegis of the Newspaper Preservation Act, there are still 21 JOA's. A couple of JOA's have come and gone, but the total remains the same.

The Newspaper Preservation Act has indeed worked to accomplish its primary intent, to preserve competitive, diverse news viewpoints and two editorial voices in two newspaper cities.

During the highly inflationary years since 1970, joint operating agreement publishers have maintained diverse voices for their respective communities, while averaging slightly lower advertising rates than all single owners of newspaper combinations and slightly higher circulation rates. So why do we now turn to your committee requesting an amendment?

Competitor factors have changed since 1970, mostly on account of the impact of television and the reading habits of the United States during the first 15 years of the Newspaper Preservation Act. Circulation penetration of JOA primary market area homes has dropped form an average of 77.5 percent to 58 percent. One-owner cities suffered a bigger loss during the same period, dropping from 99-percent penetration to 60-percent penetration. Those losses have brought demands for many advertisers for delivery of their advertising matter to up to 100 percent of the homes in their neighborhood or total markets.

Single owners of two newspapers have responded with total market coverage for advertisers, supplementing their regular paid circulation with free delivery of a so-called zone or total market coverage addition to up to 100 percent of the homes in any zone or in the full market area.

The right of JOA newspapers to do the same is not clear under the original Newspaper Preservation Act. Likewise unclear is the right of JOA publishers to publish all or part of their publications electronically. Because the act defines a newspaper as a publication printed on newsprint, almost every cable TV system devotes at least one alphanumeric channel to the display of news and advertising. A service called X-Press delivers news of every kind, including local and regional news to personal computers in office or home by satellite and cable. X-Press predicts its service will be carried by 1988 on more than a thousand cable systems serving over 75 percent of the over 50 million cable homes in the United States.

We JOA publishers believe that the original Newspaper Preservation Act provides us the same legal right as single owners to meet any competition, but there are those out there who do not agree and sometimes they sue. Joint operating agreement operations have always been able to successfully defend themselves under the act, but the cost in legal fees has been immense.

This observation is not to suggest that we return to you asking that we be made litigation-proof, far from it. Rather, we are here asking that you simply restate the language of the original act to make your intent clear that we are as free to legally compete as publishers who are not party to joint operating agreements.

Such amendments will permit us to continue responsible two-voice service to our community. So we return to your committee most respectfully requesting that you urge the Senate to approve the technical amendment embodied in S. 2314.

Thank you.

[The prepared statement of Mr. Gallivan follows:]

STATEMENT OF J.W. GALLIVAN, CHAIRMAN

THE SALT LAKE TRIBUNE

On the 9th day of August in 1967 it was my privilege to thusly introduce myself to your respected committee:

"On my right is the general counsel of Newspaper Agency and The Salt Lake Tribune, Mr. Don Holbrook.

"My name is J. W. Gallivan. I reside at No. 17 12th East St. Salt Lake City, Utah. I am Publisher of The Salt Lake Tribune and President of the Newspaper Agency Corporation and Kearns-Tribune Corporation. Kearns-Tribune is owned by the grandchildren of the late U.S. Senator Thomas Kearns and the heirs of the long time publisher of the Tribune, J.F. Fitzpatrick. It was my privilege to act as his assistant for 23 years and to succeed him upon his death just 7 years ago..."

Today, some 19 years later, all the above remain pretty much the same, except I am now Publisher Emeritus completing my 49th year with The Tribune. On my right is our same general counsel, Don Holbrook.

Three generations of descendants of Senator Kearns are still the big owners of The Tribune, but they and two generations of Fitpatricks have been joined in 7% ownership by our employee stock ownership trust.

The Tribune's now publisher Jerry O'Brien is here as he was 19 years ago, to correct any misstatement I may make. If you don't hear from Jerry you'll know I'm reciting fact.

Our Newspaper Agency Corporation is operating happily in the service of the state of Utah under a second 30 year agreement entered in 1983. Its president is now Dominic Welch who is also president of Kearns-Tribune Corporation. He is home sweeping back the Great Salt Lake.

On that 9th day of August in 1967 it was my privilege to address your respected committee in support of Senate Bill 1312, The Failing Newspaper Act, which was signed into law on July 24, 1970 as the Newspaper Preservation Act.

The Honorable Senators Thurmond and Kennedy, I believe, of your present membership were the only ones then present.

I am pleased that they have continued in office to witness the responsible performance of publishers party to Joint Operating agreements since Congress granted us, those many years ago the same rights as those enjoyed by single owners of two newspaper combinations; so that JOA publishers in (then) 22 communities could maintain two independent voices. Those rights, single plant production, single business and production payroll, combined advertising and subscriber rate cards, the record shows, have permitted Joint Operating Agreement publishers to serve advertisers and subscribers alike at rates favorably comparable to single owners of newspaper combinations. Those rights, most importantly, have produced the wherewithal in JOA cities to maintain two strong news and editorial viewponts of quality.

Why then do we return now asking for an amendment to this eminently successful Law?.

Like most businesses, newspaper publishing is subject to change. Since passage of the Newspaper Preservation Act in 1970 new reader and advertiser demands have impacted publishers, New competition has arisen.

Joint operating agreement publishers believe that the Newspaper Preservation Act permits them to meet these demands and competition; but there are those who do not.

We JOA Publishers are confident that we could successfully defend ourselves in unjustified litigation, but such defense could be immensely costly. The extreme complexity of facts and law in litigation create unacceptable risks.

So, we return to you requesting a technical amendment that will effectively reiterate the original intent of the Act to preserve two-voice JOA newspaper communities by giving their publishers the same non-predatory rights as single owners of two newspaper combinations.

We make this request proud of the record of our stewardship during the first fifteen years of the Newspaper Preservation Act. This record, we respectfully submit, fully justifies your approval of our request for technical amendment in full faith that we will continue aggressive, independent, competitive service to our readers and delivery of the circulation our advertisers demand.

A study* (Attachment A) which I shall file with my statement, compares the pricing performance of all 23 JOAs from 1970 to 1984 to all single owners of two newspapers. In 1970 there were 150 such single owners. In 1984 only 87 remained.

In 1970 single owner retail milline rates averaged 29% lower than JOAs. In 1984 JOAs retail milline rates averaged 4.43% lower than single owners.

In 1970 single owner subscriber rates averaged 5.8% lower than JOAs. In 1984 single owners averaged 4.5% lower than JOAs: $8.28 per month vs. $8.67.

In 1909, 689 American cities had competing newspapers (See Attachment B). When the Newspaper Preservation bill was introduced forty-five remained. Today there are twenty-nine and in each of these cities only one newspaper is profitable or likely to remain so.

Before the great depression the newspaper industry had discovered that survival of two newspapers, in all but the very largest cities required single plant, single payroll operation. Now that fact applies to all cities regardless of size.

Until 1933 where two newspapers survived they usually did so in single ownership. In that year competing Albuquerque publishers shared the cost of a new press and shortly afterwards merged all but their news gathering and editorial departments into a single payroll. They thus effected the economies enjoyed by single ownership and were able to preserve their independent voices.

Publishers in several other cities where failing newspapers existed believed two news voices should survive and entered arrangements like the Albuquerque joint operating agreement plan.

The Deseret News and Salt Lake Tribune, the historical balancing factors in Utah, followed suit in 1952 ending a five year circulation war.

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*The Newspaper Rates Comparative Study attached was compiled from Fas Fax (an annual publication of the Audit Bureau of Circulations for the years of 1970 and 1984; and from Newspaper Rates Differentials (an annual publication of the American Association of Advertising Agencies for the same years). Milline rates (costs per line per million readers) were calculated from 20,000 lines per year retail rates. That rate applies to the average retail advertiser and generates 50% to over 60% of metropolitan-newspaper revenues.

In the hearing before your sub-committee in 1967, George Nelson, legal counsel of the Deseret News testified: "This (circulation) effort...entailed high cost, and resulted in substantial annual financial losses to the company. Indeed, in 1952, it was apparent that such losses could not be continued. The agency operation was then suggested as a possible solution, and by mutual agreement with the owners of The Salt Lake Tribune the Newspaper Agency Corporation came into being..."

In most cities, however, two newspapers continued to be kept alive in single ownership. By 1968 there were 150 single owner morning-evening combination cities and 21 JOAs.

In 1968 a federal district court found the 1940 JOA of Tucson newspapers to be a per se violation of Section 1 of the Sherman Act. In 1969 the Supreme Court agreed and ordered dissolution of the Tucson JOA and articulated standards for the failing company defense that would effectively put an end to all JOAs.

The fact that Congress believed in the importance of diverse voices led to the passage of the NPA, which was signed into law on July 24, 1970.

The years since then have seen preservation of two voices in all of the JOAs recognized in the Newspaper Preservation Act except in St. Louis, Columbus and Oil City. Those three cities have been impacted by new (since passage of NPA) economic stresses that have involved almost all two newspaper cities. As previously noted these same stresses have reduced single owner two newspaper cities from 150 to 87 since 1970.

Coast to coast completion of all three television networks occurred in 1951. There then were six million television homes. In ten years that number grew to sixty million. This growth had a twofold effect on newspapers: loss of national advertising and loss of circulation penetration.

National advertising in 1960 generated up to 20% of newspaper advertising revenue. By 1970 it was reduced to about 5%. Primary Market Circulation penetration in all JOA newspaper cities dropped from an average of 77.54% to 58.04% in the fifteen years after passage of NPA (See attachment C). In the same 1970-84 period, combined circulation penetration in two newspaper, one-owner cities dropped from an average of 99.75% to 60.75%.

This circulation loss has caused many advertisers to divert part or all of their budgets to total market delivery services other than newspapers.

To meet this competition, two-newspaper combinations in single ownership have gone to free delivery zone editions and total market coverage to deliver all or part of their issues to up to 100% of the homes in their primary market areas. This service accomodates all advertisers demanding such distribution of advertising matter printed on various kinds of slick paper as well as newsprint. The original Newspaper Preservation Act defines a newspaper as "a publication printed on newsprint paper". This definition has given rise to questions regarding JOA publication and distribution rights under NPA and has chilled effective competition.

Likewise unclear in the Act is the right of JOA newspapers to deliver their product or parts of their product electronically. Almost every cable TV system includes an alpha numeric channel displaying news and advertising matter. Several services deliver specialized news by telephone line to personal computers in homes and offices. A service named X-Press delivers news of every kind including local and regional news to personal computers by satellite and cable. X-Press predicts its service will be carried by the end of 1987 by over a thousand cable systems serving over 75% of the 40 million cable TV homes in the U.S.

To obtain the clear right to compete now, as do single owners of two newspaper combinations, in the fields of total market coverage and electronic delivery; and to legally compete in the future meeting now unknown demands of reader and advertiser; we independently owned Joint Operating Agreement Publishers do respectfully request your approval of S. 2314.

June 10, 1986
Before The Committee
On The Judiciary
United States Senate

Attachment B

TRENDS IN OWNERSHIP OF ENGLISH-LANGUAGE DAILIES OF GENERAL CIRCULATION
AND CONTENT IN THE UNITED STATES
1880-1984

		1880	1909-10	1920	1930	1940	1945	1961	1968	1984
Circulation (Thousands)		3,093	22,426	27,791	39,589	41,132	45,955	58,080	61,561	63,082
Total Dailies		850	2,202	2,042	1,942	1,678	1,744	1,763	1,749	1,688
Total Daily Cities		389	1,207	1,295	1,402	1,426	1,396	1,461	1,500	1,550
One-Daily Cities	(A)	149	509	716	1,002	1,092	1,107	1,222	1,284	1,413
% of Total		38.3%	42.2%	55.3%	71.5%	76.6%	79.3%	83.6%	85.6%	91.2%
One-Combination Cities	(B)	1	9	27	112	149	161	160	150	87
Joint-Operation Cities	(C)								22	21
Total Lines A, B, C		150	518	743	1,114	1,245	1,279	1,400	1,455	1,521
% of Total		38.6%	42.9%	57.4%	79.4%	87.3%	91.6%	95.8%	97.0%	98.1%
Cities with two or more Commercially Competing Dailies		239	689	552	288	181	117	61	45	29

Table (1880-1968) taken from: NEWSPAPER PRESERVATION ACT, Hearings before antitrust subcommittee, H.R. 279 and Related bills, Serial No. 8, U.S. Goverment Printing Office, Washington 1969, p198.

Sources for 1984: EDITORS & PUBLISHERS INTERNATIONAL YEARBOOK for 1985; and FAS-FAX: United States Newspapers, Audit Bureau of Circulation, for Daily Newspapers.

Tony Magann
Salt Lake Newspapers
April 16, 1986

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*REGISTERED PATENT ATTORNEY

SHEEKS & RAWLINS 1875
RAWLINS & CRITCHLOW 1881
RAWLINS, THURMAN, WEDGEWOOD & HURD 1891
RAWLINS, RAY & RAWLINS 1907
INGEBRETSEN, RAY & RAWLINS 1928
INGEBRETSEN, RAY, RAWLINS & CHRISTENSEN 1941
INGEBRETSEN, RAY, RAWLINS & JONES 1948
RAY, RAWLINS, JONES & HENDERSON 1949

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IN REPLY REFER TO:
Washington, DC

June 27, 1986

Mr. Randall Rader
Chief Counsel
Subcommittee on the Constitution
Room 212
Senate Dirksen Office Building
Washington, D.C. 20510

Dear Randy:

Transmitted herewith for inclusion in the Record are the following documents in support of S. 2314:

1. Response of John W. Gallivan to Testimony of John Frank and Richard Aginian.

2. Reply of John W. Gallivan to Professor Robert G. Picard.

3. Statement of Lyell B. Clay to the Senate Committee on the Judiciary on S. 2314.

4. Statement of W.E. Chilton, III.

5. Statement of Charles T. Beaird.

6. Statement of Robert E. Lorton

7. Supplemental Statement of Howard G. Barnett, Jr., Executive Vice President, Tulsa Tribune Company.

With respect to Item 2 above, we do not find it necessary to refute point by point the oral testimony presented by Professor Picard. Professor Picard's oral remarks were based on his prepared Statement and the conclusions reached are without basis other than the study prepared by Professor Picard.

If you have any questions or comments please give me a call.

Sincerely,

David B. Lee

David B. Lee

RESPONSE OF JOHN W. GALLIVAN
TO TESTIMONY OF
JOHN FRANK AND RICHARD AGINIAN

Mr. Frank, who counsels the plaintiffs in the dormant Wick v. Tucson Newspapers, Inc., 598 F. Supp. 115 (D. Ariz. 1984), has proclaimed before this Committee that S. 2314, which proposes to clarify the Newspaper Preservation Act, sounds the "deathknell" of small papers. In so stating, Mr. Frank echoes the dire predictions of the opponents of the Act 17 years ago. One of them -- Professor Stephen R. Barnett of the University of California at Berkeley -- predicted that "the enactment of the legislation would be a national tragedy."[1/]

In reality, the Newspaper Preservation Act has been nothing of the sort, and Mr. Frank's forecast cannot withstand contradictory data that shows an exceedingly healthy state of affairs amongst suburban, weekly, and other so-called "small papers." Indeed, the "small papers" have thrived since the enactment of the Newspaper Preservation Act in 1970.

Mr. Frank testified that the amendment will allow big "downtown papers" to scoop up all the advertising "beyond city limits" and so destroy the outlying "little" papers.

If this prediction were true, in retrospect no suburban newspaper publications would exist today in 96.77 percent of America's daily newspaper markets.

Of the 1,550 cities with one or more dailies, 1,500 have single owners, and virtually every one of those offers Total Market Coverage (TMC). In addition, TMC distribution is provided by direct mail services in many daily newspaper markets.

Joint Operating Agencies (JOAs) publish in only 21 newspaper markets, 1.35 percent of the total. There is no reason whatsoever to believe their having the same competitive right in TMC as all other owners will have any different impact in their 21 markets than it has had in the other 1,500.

1/ Hearings on H.R. 279 and Related Bills Before the Antitrust Subcommittee of the House of Representatives Committee on the Judiciary, 91st Cong., 1st Sess. 235 (1969) (statement of Stephen R. Barnett). (Hereafter "House Hearing.")

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Thirteen of the 21 JOAs, including Salt Lake newspapers, already offer or have offered some form of TMC with no impact different from that found outside of JOA cities -- certainly no "deathknell" for suburban publications.

From 1970 to 1985, Salt Lake newspapers (which serve all of Utah) have decreased 10.53 percent in combined circulation and have decreased from 93.11 percent to 51.98 percent in Primary Market penetration of households, while primary market area households increased 113.54 percent (see Exhibit A).

During this same period, the four other Utah dailies, including one new entry, have increased 62.15 percent to a combined total circulation of 111,888.

In the meantime, all weeklies on the Wasatch Front (Utah's concentrated population area) gained 407.75 percent to a combined total circulation of 184,994; and Salt Lake County weeklies gained 663.7 percent to a combined total of 121,115.

The immediate past president of Suburban Newspapers of America, Richard Aginian, in his testimony on S. 2314, expressed fears similar to Mr. Frank's in regard to the adverse effect upon suburban publications of JOAs offering TMC service. Mr. Aginian said, "... if the amendment passes it is very easy to imagine JOA operations using this added monopoly tool to attack suburban newspapers and thereby silence the editorial voices of small communities not large enough or powerful enough to achieve anti-trust exemptions for their own."

Specifically, he expressed concern for the well-being of his Detroit suburban newspapers should the two Detroit dailies gain JOA approval.

Mr. Aginian is Publisher and President of Sliger/Livingston Publications, a group of ten weeklies with a combined circulation of 104,213 serving "growth areas of south-western Michigan" (according to the 1985-86 SNA Membership Roster).

According to the same source, Mr. Aginian is also President and CEO of Suburban Communications Corporation, Livonia, Michigan -- serving northern and western Detroit suburbs with 12 twice-weekly newspapers.

These newspapers have total combined circulation of 152,998, a mixture of Pay, Volunteer Pay, and Free, according to SNA.

Total circulation of the two Detroit suburban publishing companies of Mr. Aginian is 257,211.

The two Detroit dailies, each losing millions of dollars annually, both presently offer Total Market Coverage with no apparent effect on the prosperity of Mr. Aginian's groups which employ a TMC tool in their successful operation: free distribution. Some 66,175 of Mr. Aginian's Sliger/Livingston circulation is free of charge and it would appear that at least half of Suburban Communications' circulation is free of charge.

There are 126 cities in the United States that have two or more daily newspapers with circulation in excess of 50,000; 123 which have circulation of 100,000, 98 of these (including three JOAs) offer some form of TMC; but no suburban publication has been silenced.

On the other hand, weekly competition has been responsible for at least part of the "silencing" of many metropolitan dailies. Most observers give principal responsibility to weeklies for the fire sale of the St. Louis Globe Democrat.

Suburban Newspapers of Greater St. Louis, with a 69 percent circulation penetration of the entire St. Louis market, have a combined circulation of 618,520, distributed 100 percent free of charge (according to the 1985-86 SNA Membership Roster).

Their metropolitan daily competition is the venerable St. Louis Post Dispatch. Its 1985 primary market area circulation was 217,456 for a 29.5 percent household penetration, down from 50.9 percent penetration since 1970.

The St. Louis Post Dispatch, it is important to note, offers TMC.

Circulation growth of suburban publications of other SNA officers makes for a good geographical mix look at the industry in competition with dailies.

The 1985-86 SNA Roster lists William Canino (Sentinel Pub. Co.) as First Vice President of Suburban Newspapers of America;

Stephen F. Rose (Sun Publications), Second Vice President; Hank Crockett (Camarilo Daily News), Secretary; Lewis F. Fisher (Fisher Publication), Treasurer.

Mr. Canino's Sentinel Publishing Co. publishes three weeklies in Central New Jersey, out of East Brunswick. Their combined circulation has grown 51.8 percent to 63,879 since 1975. The nearest daily is the (Elizabeth, N.J.) Home News, whose daily circulation is 59,299, up 2.5 percent in the same period.

Mr. Rose's Sun Publishing Inc. is a 16 weekly combination serving Johnson County, Kansas, an affluent suburb in southwest Kansas City. From 1975 to 1985, Sun Newspapers increased circulation 25,4 percent to 72,991. Meantime, Kansas City, Missouri, Times and Star were losing 17.9 percent to 501,127; and the Kansas City Kan., Kansas dropped 34.6 percent to 16,734.

Mr. Crockett's Camarilo, Calif. Daily News is Ventura County's only morning daily Sunday through Friday. From 1975 to 1985, the Daily News gained 66 percent to 10,823 daily circulation. The nearest city daily, Ventura's Star-Free Press gained 33.7 percent to 46,326 and the Los Angeles Times rose 5.3 percent to 1,054,123. The Times' 1985 daily circulation of 707,093 in its primary market area penetrates only 25.02 percent of that area's households. That is why The Times must accommodate advertisers who demand Total Market Coverage.

Mr. Fisher is Publisher/President of Fisher Publications, Inc., San Antonio, Texas. His nine weeklies serve the northern Bexar County portion of 1.1 million population of San Antonio metro area. Fisher Publications' combined circulation (all free delivery except 4,478) totals 170,332. Fisher circulation statistics for 1975 have not yet been available to us, so growth cannot be calculated here. It is safe to say, however, that Fisher Publications' circulation recent growth has been dramatic as it has been everywhere else in fast growing suburban areas of the nation.

Between 1970, the year the Newspaper Preservation Act was signed into law, and 1985, weekly circulation nationally went

from 27,857,332 to 48,988,80-1, a 75.8 percent gain.

At the same time, the San Antonio Express News primary market circulation penetration dropped from 51 percent to 44 percent; and the San Antonio Light from 46.9 percent to 36.7 percent.

Nationally during this period one-owner two-newspaper combinations dropped from 99.75 percent household penetration in their primary market areas to 60.75 percent; and JOAs from 77.54 percent to 58.04 percent.

This is why (as with the Los Angeles Times) almost all metropolitan daily newspapers have been obliged to offer TMC for 100 percent advertising matter distribution of their entire primary market area or 100 percent distribution in geographic and demographic zones.

Competition between metropolitan dailies and weeklies within their primary market areas has always been intense. It remains intense in the almost unanimous practice of TMC. But, suburban weeklies have survived and prospered.

Outside of metropolitan newspaper markets, weeklies have no competition for their local communities newspaper advertising. They succeed in proportion to the size of the advertising community they serve.

Those who oppose S. 2314 on the grounds that it will adversely effect all weeklies know nothing of the nature of the weekly newspaper business.

Those who oppose on the ground that suburban publications will be destroyed ignore the overwhelming national empirical evidence that TMC, as practiced by publishers of dailies (of any type of ownership) and/or suburban weeklies, is not a killer.

Circulation Statistics:

Editor and Publisher Yearbooks
1976 and 1986

Suburban Newspapers of America
1985-86 Membership Roster

J.W. Gallivan
June 24, 1986

Exhibit A

UTAH WEEKLY COMPARISON
Salt Lake Metropolitan Area
1970 vs. 1985

PUBLICATION	1970	1985	Change	%
(1) West Valley View (West Valley	0	40,500	40,500	100.00%
(1) Sentinel West (West Jordan)	0	9,000	9,000	100.00%
(1) Sandy Sentinel	0	10,015	10,015	100.00%
Murray Eagle	5,435	13,000	7,565	139.19%
(1) Jordan Valley Sentinel	0	10,900	10,900	100.00%
(1) Midvale Sentinel	5,594	14,500	8,906	159.21%
Magna Times	1,955	700	(1,255)	-64.19%
(1) Green Sheet West (Kearns)	2,875	22,500	19,625	682.61%
Total Salt Lake Valley	15,859	121,115	105,256	663.70%
Davis County Clipper	4,789	10,618	5,829	121.72%
Box Elder Journal	4,121	5,750	1,629	39.53%
Box Elder News	415	5,869	5,454	1314.22%
Davis Reflex Journal (Layton)	1,256	3,937	2,681	213.46%
Lehi Free Press	1,460	2,200	740	50.68%
Hilltop Times (Ogden)	0	22,500	22,500	100.00%
Orem Geneva Times	2,667	4,050	1,383	51.86%
Pleasent Grove Review	1,267	2,400	1,133	89.42%
Tooele Transcript Bulletin	4,600	6,555	1,955	42.50%
TOTALS	36,434	184,994	148,560	407.75%
Households:	190,773	369,700	178,927	93.79%

(1) Same Publisher - Peter Bernhard

Source for Publications: Utah Press Association, Inc., Advertising Rate Directory
Source for Households: ABC Audit Reports 1985 & 1970

64-292 O - 87 - 2

Exhibit A

Utah Daily Newspapers Comparison (Daily)
1970 vs. 1985

PUBLICATION	TOTAL CIRCULATION 1970	TOTAL CIRCULATION 1985	TOTAL CIRCULATION -- CHANGE -- AMOUNT	TOTAL CIRCULATION -- CHANGE -- %	PRIMARY MARKET AREA CIRCULATION 1970	PRIMARY MARKET AREA CIRCULATION 1985	PRIMARY MARKET AREA CIRCULATION -- CHANGE -- AMOUNT	PRIMARY MARKET AREA CIRCULATION -- CHANGE -- %	PRIMARY MARKET AREA PENETRATION 1970	PRIMARY MARKET AREA PENETRATION 1985	PRIMARY MARKET AREA PENETRATION CHANGE	PRIMARY MARKET AREA HOUSEHOLDS 1970	PRIMARY MARKET AREA HOUSEHOLDS 1985	PRIMARY MARKET AREA HOUSEHOLDS -- CHANGE -- AMOUNT	PRIMARY MARKET AREA HOUSEHOLDS -- CHANGE -- %
(1) The Salt Lake Tribune	107,768	109,318	1,550	1.44%	66,243	93,128	26,885	40.59%	52.14%	43.33%	-8.81%	127,050	271,300	144,250	113.54%
(1) Deseret News	83,722	62,012	(21,710)	-25.93%	52,047	47,895	(4,152)	-7.98%	40.97%	17.65%	-23.32%	127,050	271,300	144,250	113.54%
Total Salt Lake Daily Newspapers	191,490	171,330	(20,160)*	-10.53%	118,290	141,023	22,733	19.22%	93.11%	51.98%	-41.13%	127,050	271,300	144,250	113.54%
(1) Ogden Standard Examiner	42,528	53,440	10,912	25.66%	41,527	53,190	11,663	28.09%	76.06%	58.00%	-18.06%	54,600	91,700	37,100	67.95%
(1) Provo Daily Herald	17,940	31,368	13,428	74.85%	13,969	22,021	8,052	57.64%	58.94%	45.03%	-13.91%	23,700	48,000	24,300	102.53%
(1) Logan Herald Journal	8,535	13,510	4,975	58.29%	4,167	6,785	2,618	62.83%	55.38%	57.50%	2.12%	7,525	11,800	4,275	56.81%
(2) St. George Daily Spectrum	0	13,570	13,570	100.00%	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Total Other Daily Utah Newspapers	69,003	111,888	42,885	62.15%											

* Includes out-of-state circulation reduction caused by 1976 newsprint shortage.

Source:
(1) September 30 ABC Report
(2) 1986 AMPA Yearbook

REPLY OF J. W. GALLIVAN
TO PROF. ROBERT G. PICARD

ADVERTISING AND CIRCULATION RATE COMPARISONS

OF U.S. TWO NEWSPAPER OPERATIONS

1973-1984

The attached study of advertising and circulation rates finds that publishers of Joint Operating Agreement newspapers have behaved responsibly in the maintenance of fair advertising and circulation rates compared to single owner of two-newspaper operations whose rights in price fixing were granted JOAs by the Newspaper Preservation Act of 1969.

The Study shows 23 JOAs averaging monthly subscription rates in 1984 4.7% higher than 74 single-owners of two-newspaper operations and retail milline rates averaging 4.49% lower than their single-owner counterparts. There were in 1984 about 15 additional single-owner operations. They were small 2 newspaper operations mostly with circulations less than 25,000. They are not included in the study because their advertising rate data was not available.

Robert G. Picard, Phd, Professor of Journalism at Louisiana State University released two newspaper rate studies during 1985. These studies conclude that Joint Operating Agreement newspapers are not performing in the interest of either advertiser or newspaper reader as well as do competing newspapers operating out of separate plants or single newspapers publishing in small cities.

The small newspaper comparison study ends questioning whether JOAs "should be allowed to set prices without public oversight" or "whether the rate of return for JOA operations should be unregulated."

These and several other conclusions reached by the two studies are based on several fallacious assumptions, the most obvious such assumption being that logical and relevant advertising circulation rate comparison can be made between JOAs and competitive newspapers or single small city newspapers.

Picard study: (Table I) median single newspaper daily circulation 11,146; average circulation 19,028. Table II median JOA combined daily circulation 179,184; average JOA circulation 231,951.

Since the 1966 decision of the Supreme Court in the Tucson newspapers case two independently owned newspapers wishing to survive profitably in one market place have not enjoyed the options of being either a single newspaper or competitive. Imperically and overwhelmingly over more than fifty years it has been proved that there is no economic survival possible in independent competitive newspaper publishing regardless of the size of market.

The battle for survival in competitive markets produces advertising and (sometimes) circulation rates that cannot be relevantly compared to JOA rates which are structured to produce a reasonable profit. Likewise single newspapers, particularly those in small towns, do not generate rates comparable to JOAs, which must support two very costly metropolitan news-gathering operations and two even costlier circulation distribution systems plus far greater newsprint costs per copy because of the greater number of pages published by metropolitan newspapers. Any comparison of JOA rates with either competitive or small single newspapers is an apple and orange exercise.

So as to preserve two voices in one market, JOA ventures are given (by the Newspaper Preservation Act) the same legal rights as single owners of two newspapers in one market. Like single owners, JOAs are prohibited from predatory pricing.

JOA and single owners publish out of single plants with almost identical economic factors and stresses to dictate their rate structures. To meaningfully measure service to advertisers and reader by rates, JOAs can be logically compared only to one owner single plant operations publishing two newspapers with similar total circulations.

Attached (Table II) is such a comparison. The years 1973 and 1984 were used to calculate rate increases as a percentage because stored data for those two years was readily available. For the same purpose, if not the same reason, Prof. Picard's studies used 1972 and 1982 as base years.

The Picard studies compare general (national) advertising rates which are almost always substantially higher than local rates. National newspaper advertising produces only a small part of total advertising revenue in most all metropolitan newspapers. Salt Lake's JOA operation is typical. Here is its 1984 advertising revenue split:

Local Retail	56.32 %
Classified Contract	16.03
Classified Transient	13.47
Local General	7.03
National	6.24
Legal	.91
	100.00%

The attached study comparison (Table II) is of retail rates of all two-newspaper operations with combined circulations above 25,000. These rates are published annually by the advertising agency industry. The rate bracket used is 20,000 lines per year, that being the approximate useage of the average local retail advertiser in metropolitan markets.

Almost all metropolitan newspapers were formated in 8 columns in 1973. Almost all are in 6 columns in 1984. Milline Rates are comparable, therefore within each year, but not between years. 1984 rate increases as a percentage over 1973 are understated by 25%, but uniformally so. Consequently rate increase comparison (as shown in the attached study) between two-newspaper operations results in an accurate parallel measurement of rate adjustments between 1973 and 1984. Here is a summary of Table II Milline findings.

Two Newspaper Operations
Milline Rate Increase 1973-1984

Circulation	Number Of Operations	1984 Average Combined Milline Rate	Milline Rate Increase 1973-1984
Over 500,000	1 JOA	6.927	146.52%
	2 One Owner	8.349	145.93%
Over 400,000	4 JOA	8.926	232.76%
	2 One Owner	5.596	210.90%
Over 300,000	2 JOA	6.504	169.33%
	9 One Owner	8.069	231.04%
Over 200,000	2 JOA	7.570	205.23%
	9 One Owner	8.314	212.55%
Over 100,000	11 JOA	9.361	221.50%
	23 One Owner	9.129	193.93%

25 to 100,000	3 JOA	10.819	162.17%
	34 One Owner	11.209	174.84%
Total	23 JOA	8.492	192.39%
	74 One Owner	8.874	204.66%
TOTAL	One Owners	Higher 4.49%	Higher 6.37%

Table II itself shows that 13 of the 23 JOAs had lower advertising rate increases between 1973 and 1984 than their one-owner counterparts in each circulation bracket. Two additional JOAs show larger advertising rate increases than single owner newspapers in their bracket, but by less than 9%. See table II.

Eight JOAs show greater increases than one-owner, same-circulation-bracket counterparts, but JOAs in all circulation brackets (but two) average lower actual 1984 milline ($8.492) rates than their one-owner counterparts ($8.874). In the 100,000 to 200,000 circulation bracket eleven JOAs average only 2.5% higher in milline rate than 23 one-owner counterparts.

There is only one JOA in cities with over 500,000 circulation. Its 1984 milline rate was $6.927 compared with two single-owners averaging $8.349.

The weighted (by number of newspapers in each circulation bracket) average 1984 milline rate of 23 JOAs was $8.966 compared with $9.729 for 74 one-owner morning-evening combination, a difference of 8.5%.

It is interesting to note that since 1973 thirty one-owner morning-evening-Sunday combinations have either gone to all-day publication (usually with morning home delivery, or to morning or evening only usually morning). Since the Newspaper Preservation Act of 1970 the number of one owner two newspaper combination has dropped from 150 to 87. The number of JOA combinations is now 21 but has been as high as 23.

No JOAs, of course,can make the very profitable move to one newspaper they being required by the Newspaper Preservation Act to maintain two independent editorial and news publications.

Data of the attached study demonstrate that insofar as advertising rates and rates of increase of advertising rates are measurements of fair treatment of advertisers that JOAs generally have performed slightly better than single owners of two newspapers, the only type of newspaper ownership with which JOAs can be relevantly compared.

Circulation rate increase comparisons are not meaningful in measurement of anything except each newspapers success in increasing subscription revenue without losing significant circulation. Here is a summary of table II circulation rate findings:

Two Newspaper Operations
Circulation Rate Increase 1973-1984

Circulation	Number of Operations	1984 Monthly Rate	Increase Over 1973
Over 500,000	1 JOA	$ 9.00	80.00%
	1 One Owner	9.50	120.93%
Over 400,000	4 JOA	9.25	126.30%
	2 One Owner	8.00	119.48%
Over 300,000	2 JOA	9.71	147.39%
	4 One Owner	7.55	98.68%

Over 200,000	2 JOA	6.78	115.08%
	9 JOA	8.69	118.47%
Over 100,000	11 JOA	9.32	156.08%
	23 One Owner	7.89	118.23%
25 to 100,000	3 JOA	7.95	144.62%
	34 One Owner	8.08	132.86%
Total	23 JOA	8.67	125.60%
	74 One Owner	8.28	117.95%
TOTAL	JOA	Higher 4.7%	Higher 6.48%

Historically newspapers have attempted to recover from circulation revenue a sufficient amount to offset the newsprint and mechanical costs of printing their news and editorial content. This does not include news coverage costs.

Metropolitan newspapers long since have been hard put to maintain circulation rates acceptable to readers and pay all of the mechanical and newsprint costs of publishing news content. Circulation revenue in Salt Lake City in 1984 offset 99.4% of these costs, a good accounting performance, but one that does not reflect the substantial actual loss per average copy sold by metropolitan publishers.

Between 1973 and 1984 Salt Lake newspapers have been obliged to raise subscription rates 110.8% (all JOAs an average of 125.60%, all other two newspaper owners 117.95%).

Combined circulation in the primary market of the two newspapers, however, has slipped in penetration in the same period from 75% to 56%, again about the national average. Audit Bureau of Circulations figures do not include "pass--along" circulation which appears to be significant in numbers (if not in contribution to revenues).

JOA primary combined morning-evening market circulation penetration in the fifteen years following the passage of Newspaper Preservation Act dropped from an average of 77.54% to 58.04%. During the same period combined circulation penetration averages in primary markets of single owner combination dropped from 99.75% to 60.75%.

Because of this severe decline (attributable principally to television viewing) newspapers have increased subscriber rates in advances as small as possible, so as to hold penetration losses to a minimum.

Increases in reader rates throughout the time period studied have been determined, as they always have been, by what the traffic will bear.

Prof. Picard's studies find greater subscription rate increases in JOAs than in the two irrelevant groups he compares and concludes JOAs increase reader rates beyond minimum needs for reasonable profitability.

For what it's worth, the attached relevant comparison (See summary page 5) of JOAs with single owner two newspaper operations shows average circulation rate increases (1973-1984) to have no significant differences.

In light of the foregoing and the economic facts of life of two-newspaper publishing, responses to eight conclusions of Prof. Picard's study must be made.

1. Picard: "It is not unwarranted to surmise that joint operating agreement papers deliberately reduce unprofitable circulation (an accepted management practice) and did not seek to expand their market."

Fact: Reader demand and uncontrollable costs of newsprint and transporation during the past fifteen years have decreased the primary market of many metropolitan newspapers as defined by the Audit Bureau of Circulations. Salt Lake newspapers were forced to stop home delivery to sparsely populated areas on the outskirts of Utah when monthly losses of such delivery rose to twice the loss of the average home delivered copy sold. Mail delivery to subscribers, of course, continues to be available in those areas as does single copy sale in most towns.

Contrary to Prof. Picard's apparent impression, there is no such thing as "profitable" circulation. Forcing circulation beyond natural demand is a quick way to red ink.

Many JOAs and single owners of two newspapers have had similar experiences to Salt Lake newspapers. Regardless of kind of ownership most metropolitan newspapers no longer can offer home-delivery beyond a fifty mile radius or beyond the nearest daily newspaper city. Sufficient demand simply does not exist. Where there is even small demand, however, most newspapers continue single copy sale.

Basically this reduction of metropolitan newspapers primary market area has been brought about by lack of reader demand. In a few very large cities newspapers have been forced out of slum areas because of lack of demand and/or carrier security concern.

Neither this sort of withdrawal of home delivery or that brought about by distance from city of publication has caused more than a slight decrease in circulation totals.

Newspapers are no different from any other product. Their market is defined by demand. To say that JOAs (or any other kind of newspaper) "did not seek to expand their markets" is naive. Their market for survival is their Primary Market Area and their struggle to maintain penetration there is intense and immensely costly.

Ever since 1958 when national televison networks were extended nation wide, newspapers have been fighting a losing battle to simply hold circulation penetration. Most metropolitan newspapers are forced to repurchase (in new starts) from 50% to 100% of their total circulation just to stay even with "last year". In 1984 Salt Lake rewrote 88.3% of its total circulation in starts including voluntary starts by readers moving to a new address. They accounted for about one third of the rewrite. Few newspapers are able to expand penetration in proportion to population growth. In most markets circulation penetration continues to decrease year after year.

Salt Lake's experience is typical of two

newspaper towns. In 1952, when it became a JOA city, penetration was above 93%. Penetration held well until the national extension of network television. Thereafter penetration dropped rapidly. Salt Lakes combined circulation penetration is now about 56%.

The losing fight to expand market, increase penetration, has become the greatest of circulation cost increases. In 1973 the Salt Lake newspapers cost of a subscription start was $1.27; in 1984 $15.67.

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2. Picard: "The passage of the Newspaper Preservation Act (may have) emboldened operators of JOA papers to raise prices beyond that which they might have done and at a rate above those of other monopoly papers."

Fact: The Newspaper Preservation Act imposes the same legal restraints on JOAs as single owners of two newspapers, including predatory pricing.

From 1973 to 1984 one-owner operations averaged milline rate increases 6.37% higher than JOAs. 1984 milline rates averaged $8.874 for one owners and $8.492 for JOAs, a 4.49% difference.

From 1973 to 1984 JOAs averaged subscription rate increases 6.48% higher than one-owners. 1984 monthly subscription rates of JOAs averaged 4.7% higher than single-owners.

Judging by these comparative rate increases it is evident that JOAs perform about the same as single owners in fixing prices, just as the Newspaper Preservation Act intended.

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3. Picard: "Joint Operating Agreement newspapers increase their advertising space rates well beyond the minimal needs of keeping their operations profitable and providing reasonable rates of return."

Fact: This is unfounded speculation. Table II shows JOAs maintain rates at about the same level as other two-newspaper combinations. This would indicate similar profits. Actual average profits in the newspaper industry are not known. According to Morton Research (see table III) publicly owned newspaper chains average profit in 1984 was 9.9%, their ten year average 9.1%. Newspaper-only profits, however, are not shown separately from these chain total profits which include revenues from all sources including radio and television profits which usually are higher than newspaper only profits.

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4. Picard: "It may be that JOA papers are using the hefty subscription price increases to help reduce the circulation."

Fact: JOA subscription rates increases are no heftier than those of single-owners of two newspapers. Reader demand determines circulation. (See 1. Picard.)

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5. Picard: "It may be surmised with a great deal of confidence that JOA papers are engineering profit by cutting out unwanted circulation."

Fact: There is no such thing as "unwanted circulation" or "profitable" circulation. Some circulation is no longer achievable because of distance from primary market area (reader demand). Each year publishers spend millions repurchasing circulation in a desparate effort to maintain penetration.

Newspapers rely on advertising for 80 or more percent of revenues. Circulation must be maintained at the highest possible level to assure continuing advertiser patronage. (See 1. Picard)

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6. Picard: "The findings of this study support the views that monopoly situations created by Joint Operating Agreements result in price behavior even more monopolistic than that found in single newspaper monopolies".

Fact: The findings of Chart II show JOAs price behavior is about the same as other two-newspaper operations, such behavior being controlled by reader and advertiser demand. (See 2. Picard)

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7. Picard: "De jure monopolies exhibit more predatory behavior than do de facto monopolies."

Fact: This is another altogether unfounded assumption. If rates or pricing increase are a measure of predatory behavior then all two-newspaper operations, either JOA or single owner, are equally guilty or equally innocent. (See 2. Picard).

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8. Picard: "One also has to question whether the rate of return for JOA operations should be unregulated. Whether it deserves equivalent returns to those of other monopoly papers or competing papers, or should be set at lower rates in return for the anti-trust protection, should be considered".

Fact: Judging by similarity of circulation and milline rates it would appear that JOAs and single owner two-newspaper operations enjoy about the same level of return. This seems fair enough since both kinds of owners have identical "anti-trust protection", and both are denied predatory practice.

Conclusion: The Newspaper Preservation Act has worked remarkably well accomplishing the primary intention of the Newspaper Preservation Act: To maintain two independent voices in two newspaper cities.

J. W. Gallivan
The Salt Lake Tribune
6/5/86

STATEMENT OF
LYELL B. CLAY

To The
SENATE COMMITTEE ON THE JUDICIARY
On
S. 2314

Mr. Chairman and members of the Committee on the Judiciary, I am Lyell B. Clay, Publisher of the Charleston Daily Mail, of Charleston, West Virginia. I am submitting this statement in support of S. 2314, a bill to amend the Newspaper Preservation Act, now pending before your Committee, following hearings on June 10, 1986.

The Charleston Daily Mail has, since 1958, been a partner in a joint operating arrangement (JOA) with the Charleston Gazette. A separate statement submitted to your Committee by W.E. Chilton, III, Publisher of the Charleston Gazette, provides further information about our operating agreement.

Both the Daily Mail and the Gazette supported passage of the Newspaper Preservation Act, enacted in 170. As the Committee is aware, the Newspaper Preservation Act was passed following the decision of the United States Supreme Court in Citizen Publishing Co. v. United States, 194 U.S. 131 (1969), which found the Tucson joint operating arrangement to be in violation of the antitrust laws. The Newspaper Preservation Act granted Tucson and other JOAs an exemption from the antitrust laws, recognizing that the two separate newspapers in a JOA had entered into a commercial merger. The purpose of the Act was to retain separate and diverse news voices in each JOA city by allowing the agency to conduct commercial operations as if it were a one-owner newspaper.

We are now supporting S. 2314 as a technical amendment to the Newspaper Preservation Act, because it will clear up any confusion that exists about what Congress intended when it enacted this legislation in 1970. It is not that we are seeking permission: it is already there in the Act, but it appears to be inside out. In other words, the Act says JOAs cannot engage in actions which a single newspaper cannot do. It should say more clearly that we can do whatever a single newspaper can do. That was clearly the intent of Congress in 1970; otherwise the Act would not make any sense.

In the sixteen years since enactment of the Newspaper Preservation Act, there have been charges in the business or commercial operations of all newspapers, but questions have been raised as to the

propriety of JOAs conducting their operations on a par with their competition. We are particularly interested in two things -- what is called total market coverage (TMC) and the possibility of electronic transmission of our newspapers. These are new marketing techniques and technological advances we know about now and would like to utilize. But, of course, this is not a static business, and we would like to be sure that we can lawfully engage in whatever developments turn up that will strengthen our papers and keep them competitive.

Although we believe that this S. 2314 merely clarifies congressional intent behind the Act, the present ambiguity in its language exerts a chilling effect in the way we run our business. We are afraid that, if our papers do something our competition objects to, we will find ourselves slapped with an antitrust lawsuit and the possibility of treble damages and other sanctions. We simply cannot afford to be competitive as the Congress intended when the Act was first passed in 1970. We are aware of the immense costs involved in antitrust litigation that, as noted in the statement submitted by Thurston Twigg-Smith of the Honolulu Advertiser, can exceed one million dollars in one case - and that was a case in which the Advertiser won. In Charleston, our two newspapers, with combined circulation of just over 100,000 daily, simply cannot afford such costs, and therefore are most reluctant to engage in activities that our lawyers consider subject to suit based on a recent court decision in Tucson.

The alternative, to not keep up with other newspapers and with our competition, will prove destructive of our operations because loss of advertising will diminish our ability to maintain two separate and strong news voices.

Newspapers are a very fragile product. We have to keep pace economically with our competitors in the information business because, if we do not, it does not matter how good our editorial and reportorial product is, we will not be able to put it out. Any time we feel we cannot match innovation for innovation out of concern that someone might sue us under the antitrust laws because the Newspaper Preservation Act may not be clear, we slip behind. If we get too far behind, it will not make any difference how good our editorial and reportorial package is, we will be on our way out of business.

S. 2314 would enable the Charleston Daily Mail and the Charleston Gazette to play on a level playing field with other newspapers. Of course, we cannot be predatory or engage in destructive competition. That is, and will continue to be, banned under the Newspaper Preservation Act. Any JOA which does violate the law deserves to be sued. But we believe that Congress should make clear through S. 2314 the intent of Congress in 1970 in passing the Newspaper Preservation Act. We should not be subject to suit for legitimate activities which are endemic to newspaper operations.

For these reasons, I urge the Committee to favorable report S. 2314.

STATEMENT OF
W.E. CHILTON, III

Before The
Senate Committee on the Judiciary
On
S. 2314

Mr. Chairman and members of the Committee on the Judiciary, I am W.E. Chilton, III, Publisher of the Charleston Gazette. The Charleston Gazette, a morning newspaper, and the Charleston Daily Mail, an afternoon newspaper, entered into their joint operating agreement (JOA) in 1958. The two newspapers formed a partnership, called Charleston Newspaper, to conduct all of the commercial operations for both the Gazette and the Daily Mail. This would include all expenses involved in the printing and distribution of both newspapers, as well as all sales and marketing activities. The Gazette and the Daily Mail are equal partners in Charleston Newspapers.

We at the Gazette continue to provide the news, features and editorial content for the morning newspaper, and the Daily Mail continues to provide the news, features and editorial content for the afternoon newspaper. There is real competition and true diversity in the two separate newsrooms. The commercial operations have, indeed, been merged, and are conducted just like a one-owner operation.

Let me return for a moment to 1958, when, if we had not entered into a JOA, only one newspaper would have survived. Keep in mind that Charleston, West Virginia, while it is our State Capital, is not a large city. Today, the Gazette has a circulation of approximately 55,000 daily, while the Daily Mail's circulation is just about 53,000. To those familiar with newspaper publishing today, it is a known fact that there are very few if any communities our size where there continue to be two separate news voices.

Without the economies afforded by our joint operating agreement, and the limited exemption provided by the Newspaper Preservation Act in 1970, there would be no conceivable way in which we would continue to provide this capital city with the diversity of news voices and editorial product which is the hallmark of our JOA. The commercial merger effected by our joint operating agreement is central to our continued existence and success. Let me add that Charleston, together with the JOA in Chattanooga, Tennessee, are the two smallest JOAs.

We actively supported passage of the Newspaper Preservation Act in 1970, with the understanding, as exemplified in the Report on that legislation filed by this Committee, that a JOA would be considered as a commercial merger, and so treated under the antitrust laws. We are now advised by our attorneys that there may be some doubt, or ambiguities, in the language of the Act that may prevent us, and other JOAs, from participating in the full range of newspaper related activities that our colleagues at all other daily and weekly newspapers, can and do enjoy.

I refer, for example, to a marketing strategy referred to as total market coverage, or TMC. This involves a newspaper providing delivery of certain advertisements, including inserts, to every home and apartment within a stated area, such as a city, or a number of postal zones. The entire newspaper, including the advertisements, is delivered to all of the newspaper's subscribers. A separate package is prepared for delivery (by carrier or via mail) to non-subscribers. The package is not the entire newspaper, but generally includes some news and editorial content, but not to the same extent as the full newspaper, together with ROP (run of press) advertisements and advertising inserts.

TMC products are in common usage by many, if not most daily newspapers throughout the United States. Yet, a Federal Court decision in Tucson has placed in doubt like activities by JOA newspapers - because of the alleged limited newshole in the TMC copy, and also because of the use of "slick" paper for the advertising inserts. If the Federal Judge in Tucson is correct in his interpretation of the Newspaper Preservation Act - which we do not concede - the JOA newspapers are in real trouble. If we cannot keep up with innovations in our industry, we will be pushed aside. It is inconceivable to me, in viewing the history of the Newspaper Preservation Act, that Congress intended so anomalous a result.

Another innovative area, and one where many non JOA newspapers have already commenced operations, is in electronic delivery of all or selected portions of its newspaper. This is through electronic delivery of newspapers via cable, together with printer attachments which can produce selected portions, or even all of the contents of a newspaper. Again, questions based upon seeming ambiguities in the Act are said to preclude only JOAs, among all newspapers, from participating in this new technology.

While our lawyers tell us that we should be able to undertake these activities under the Newspaper Preservation Act, the litigative costs are really more than the two newspapers in Charleston can afford.

The Newspaper Preservation Act was not intended to place restrictions on normal business practices against JOA publications. For that reason, the Act should now be amended to correct what would appear to be technical deficiencies in its language.

I, together with other JOA newspapers, urge this Committee to favorably report S. 2314.

STATEMENT OF
CHARLES T. BEAIRD

BEFORE THE
SENATE COMMITTEE ON THE JUDICIARY

IN SUPPORT OF
S. 2314

My name is Charles T. Beaird, and I am the President and Publisher of the Shreveport Journal. The Shreveport Journal is an afternoon newspaper, with daily circulation of approximately 25,000 in Shreveport, Louisiana.

In 1953, the owners of the Shreveport Times, a daily morning newspaper, and the Shreveport Journal agreed to enter into a joint operating arrangement. That is, the two newspapers entered into a commercial merger, while each continued to provide a separate and distinct news voice. That arrangement has continued to this date, with the Newspaper Production Co. responsible for all of the commercial aspects to publishing both the Times and the Journal - including all purchases of supplies, and employment of all production personnel, as well as the marketing and circulation departments. Each day, the Journal, and the Times, provides the news and editorial content for its respective newspaper. While the commercial competition ended in 1953, the news and editorial competition continues to thrive. Without the JOA in Shreveport, however, there is little doubt but that there would be only one news voice.

The idea of the joint operating agreement began in 1933, when the two newspapers in Albuquerque devised this novel way to save and retain two news voices. Now there are twenty-one cities with JOA operations. As the Committee may recall, in 1969 the United States Supreme Court held that JOAs were in violation of the antitrust laws. The Congress responded in 1970 by passing the Newspaper Preservation Act. In that Act, the Congress specifically found that it is in "the public interest of maintaining a newspaper press editorially and reportorially independent and competitive in all parts of the United States." To do so. the Newspaper Preservation Act provided a limited antitrust exemption to the antitrust laws (section 1 of the Sherman Act) to newspapers in joint operating arrangements.

Since passage of the Newspaper Preservation Act in 1970, the Shreveport Journal and other newspaper in JOAs have been able to serve

the public interest by continuing to provide separate news voices, fulfilling the intent of the Congress. Since 1970, while newspaper voices in a number of cities have been stilled, by the termination of newspapers like the Baltimore News - American, there have been three new JOAs formed and still in existence, and the renewal of the JOA agreements in several cities, including Shreveport.

While all of this is to the good, there is a serious danger on the horizon in the context of a recent Federal Court decision in Tucson involving the JOA in that city. That decision would appear to preclude JOA newspapers from engaging in a marketing arrangement called total market coverage, or TMC. A growing number of advertisers, both local and national, require that their advertisements be delivered to every home or apartment in a target area, e.g., a city or one or more postal zones. This can be accomplished directly by direct mail marketing firms, by using third class mail to all of the residences in the target area. A newspaper can deliver the advertisements to all of its subscribers, and then either mail or hand-deliver a package of advertising inserts, inside a "wrapper" of news and editorial matter, to all non-subscribers. Use of TMC is common with most daily newspapers and many weekly newspapers.

Based on the language of the Newspaper Preservation Act, and its clear legislative intent, we had believed that JOAs, together with one-owner newspapers, could employ TMC marketing. The Tucson decision holds that this is not so, and that in using TMC marketing, a JOA is in violation of the antitrust laws. We believe the Tucson decision is in error, but it is not ripe for appeal. However, the exposure to a small, family-owned newspaper is too great for us to undertake like activities. While we believe we would succeed in such litigation, the legal and related costs of antitrust litigation is altogether too steep for the Shreveport Journal. We are, to my knowledge, the smallest (circulation) JOA publication.

Thus, we are most reluctant to use a marketing technique now used by our competitors and available to all of our newspaper brethren. This has a chilling affect on our operations, with loss of advertising revenue that, in turn, diminishes our ability to maintain two strong, diverse voices in Shreveport. This was not the intent of the Congress in the Newspaper Preservation Act.

There are other innovations in newspaper publishing which, under

the rationale of the Tucson decision, would similarly appear to be prohibited to newspaper in JOAs. For example, the technology now exists for electronic transmission - by cable, telephone lines, or via satellite - of newspapers into the homes of our readers. Not only may the reader view any part of a newspaper on his TV or computer screen, but a printer attachment would allow the reader to print out for later review or reading the relevant sections or information from the daily newspaper - whether it be stories on tax legislation or classified advertisements. The technology now exists and is available for such electronic transmission of newspapers, but the present day expense keeps it from being cost effective.

It is only a matter of time before newspapers make common use of electronic transmission - all newspapers, that is, other than those in JOAs. Again, we must have TMC, electronic transmission and other new innovations in publishing to keep pace with other newspapers and our competitors. It just does not make sense for JOA newspapers to be precluded from such operations.

Therefore, I support, and urge your Committee and the Congress to act favorably on S. 2314, a bill which would provide technical amendments to the Newspaper Preservation Act, and make it clear beyond preadventure that JOA newspapers are to be treated the same as all other newspapers under the antitrust laws. We are not seeking in S. 2314 a new exemption, but only a classification of the exemption provided in the Newspaper Preservation Act, and in keeping with the stated intent of the Congress in passing that Act.

I want to state, further, that I am most appreciative of the Newspaper Preservation Act, and am grateful for the opportunity to provide my comments on and support of S. 2314. I urge its favorable consideration and passage during this Congress.

STATEMENT OF
ROBERT E. LORTON

IN SUPPORT OF
S. 2314

BEFORE THE
SENATE COMMITTEE ON THE JUDICIARY

My name is Robert E. Lorton, and I am the President of World Publishing Co., the publisher of the Tulsa World. I am offering this statement in support of S. 2314, a bill pending before the Senate Committee on the Judiciary, and on which hearings were held on June 10, 1986.

It is my understanding that S. 2314 provides technical and clarifying amendments to the Newspaper Preservation Act, passed by the Congress in 1970. That Act provided a limited antitrust exemption to Section 1 of the Sherman Act for newspapers in joint operating agreements, on the premise, in fact the specific Congressional finding, that it is in the public interest to maintain diverse newspaper voices where possible.

The Tulsa World entered into a joint operating arrangement (JOA) with the Tulsa Tribune in 1941, at a time when only one newspaper could survive economically. A number of newspapers in like circumstances had entered into JOAs in the years preceding 1941, and it appeared and proved in Tulsa to be the effective way of preserving two separate news voices in a City which could only support one commercial newspaper operation. The JOA in Tulsa, as with other JOAs, is a commercial merger of all of the business and commercial operations of the two newspapers, the World and the Tribune, into one company, the Newspaper Printing Corp. The Newspaper Printing Corp. engages in all of the business and commercial activities of the World and Tribune - covering all costs associated with printing, sales (marketing) and circulation. NPC buys all supplies, and pays the salaries of all persons involved in printing, sales and circulation. Owners of the World and the Tribune share in the ownership of NPC - just as shareholders in "one-owner" newspapers share in the ownership of those publications. The distinction between a JOA and a one-owner newspaper is not in the way commercial operations are conducted - by and large they are the same - but in the maintaining of two separate news voices, one in the World and the other in the Tribune.

In passing the Newspaper Preservation Act in 1970, Congress recognized this distinction. It found a JOA to be a commercial merger,

with the benefit to the public of maintaining two newspaper voices where otherwise only one could exist. The language in the Act makes clear that the antitrust exemption granted to JOAs was not unlimited, and if a JOA were to undertake acts that would be unlawful if done by a one-owner newspaper, they would likewise be unlawful if engaged in by a JOA. Thus, the exemption was intended to cover Section 1 of the Sherman Act, in recognition of the commercial merger effected by the JOA. Implicit in the Act is the understanding that a newspaper in a JOA can do anything which it could lawfully undertake were it not in a JOA.

Unfortunately, the language of the Newspaper Preservation Act has been construed by a Federal Court in Tucson to preclude JOA newspapers from activities which are lawfully provided by daily and weekly newspapers.

I refer to total market average (TMC), a marketing strategy in common use by hundreds of newspapers, and which has been found by a number of courts to be a lawful and proper marketing technique. Under TMC, advertisers seek total penetration of a market, to every residence within a stated geographical area. A newspaper accomplishes this by delivering the advertising materials to all of its subscribers receiving its newspapers. Delivery is also provided of the advertising matters, usually wrapped in some news and editorial content, to all of the remaining target residences. This is a legal and legitimate way of doing business, as long as it is properly priced and not predatory.

The Tucson decision, however, holds that a JOA employing TMC marketing is in violation of the antitrust laws. Thus while over 1500 daily newspapers, and hundreds more weekly newspapers, may use TMC, the twenty-one (21) cities with JOA newspapers are precluded from same. This is not in keeping with the intent of Congress in enacting the Newspaper Preservation Act.

While we believe the Court in Tucson is in error, the decision there has placed a chill on our operations. We are most reluctant to engage in activities which we consider proper, but where our exposure to antitrust litigation is so great. The Tulsa World is a family owned newspaper, and is not in a position to sustain the costs associated with antitrust litigation.

The alternative, which is foregoing advertising to our competitors, necessarily diminishes our ability to continued maintaining

two strong diverse voices in Tulsa. Again, this runs contrary to the stated purpose of the Newspaper Preservation Act.

S. 2314 would, by clarifying amendments to the Newspaper Preservation Act, make explicit that which is implicit in the Act. It would not broaden the scope of our exemption, but would ensure that the Congressional purpose of the Act is fulfilled.

I should note that there have been other innovations and technological changes in newspaper publishing since 1970 which are also subject to misinterpretation under the Newspaper Preservation Act. I refer, for example, to the new technologies which enable a newspaper to be electronically transmitted into a home or office by cable, phone line, or satellite. A reader can call up on his cable or computer any part or all of his daily newspaper. An attachment provides for a printout of any section the reader wishes to retain for later review. The technology is new, and the cost is high. Yet, it is only a matter of time before daily and even weekly newspapers can take advantage of electronic technology.

JOA newspapers should not be prohibited from issuing these new means of delivery, or left out if their competitors take to electronic delivery of like news and advertising matter. As noted above, the Newspaper Preservation Act was not intended to make JOA newspapers into "second-class citizens", unable to undertake activities common in publishing. The provisions of S. 2314 would, by technically amending the Newspaper Preservation Act, give full vent to the intent and purpose of that Act. Only in that way can the JOA publishers continue to provide diverse news voices in their communities.

I would urge the Judiciary Committee to favorably report S. 2314.

SUPPLEMENTAL STATEMENT
OF
HOWARD G. BARNETT, JR.
EXECUTIVE VICE PRESIDENT
TULSA TRIBUNE COMPANY

S. 2314

SENATE COMMITTEE ON THE JUDICIARY

On June 10, 1986, I made a statement and participated in a panel discussion on S. 2314, a proposed amendment to the Newspaper Preservation Act. At the hearing, certain questions were left unanswered and the Chairman left the record open for supplemental statements.

The first matter I would like to address is a question raised by Senator Simon regarding whether or not the adoption of the amendment would be likely to affect the concentration of ownership in the newspaper industry. By this question I assume that Senator Simon is concerned with the continued growth of chain ownership of newspapers in America.

As an officer of an independent newspaper which is a member of a joint operating arrangement, or JOA, composed of two family controlled, independent newspapers, I am also concerned about the growth of chain ownership.

While it is impossible to predict the ultimate effects of the adoption of or failure to adopt S. 2314, it is my judgment that the failure to adopt this proposed amendment to the Newspaper Preservation Act will more likely result in increased concentration of newspaper ownership. My reasoning on this can be summarized as follows: If the stronger member of a JOA believes that the joint operating arrangement inhibits its ability to effectively compete, it may find it to its advantage to attempt to terminate the JOA or not renew it upon its termination. If the weaker member perceives this as a possibility, it may seek a strong partner in the form of a newspaper chain to counteract this possibility.

It must be remembered that the whole purpose of S. 2314 is simply to allow JOA's to compete with the ever changing competitors in the newspaper and advertising businesses. While we believe that the intent and purpose of the Newspaper Preservation Act is clear and that we should be allowed to do whatever a one owner newspaper can do, counsel has continued to advise us that there are risks in this because of the restrictive wording of the Newspaper Preservation Act. Thus, the Act exerts a chilling effect on our ability to compete by requiring us to weigh the potentially debilitating effects and costs of complex anti-trust litigation (even if we win) against the benefits of meeting the competitors.

This is not an easy choice and is one which is even more difficult for the smaller, independent newspapers. This is another reason that I believe the failure to adopt S. 2314 could lead to increased chain ownership in JOA papers. A much larger, stronger financial entity is better able to run the risks of expensive anti-trust litigation and to thereby rely on the express intent of the Newspaper Preservation Act, as opposed to its specific language, to undertake the necessary competitive actions.

It is almost axiomatic in classic economic theory that the inability of certain participants in an industry to effectively compete in that industry will result in further concentration of ownership within the industry. I think, therefore, that S.2314 must be adopted to give the independent, smaller JOA newspapers the opportunity to compete effectively and to thus resist the pressures to become a part of a larger chain operation.

The second question that I would like to address was raised by Senator DeConcini. This question revolved around the timing of S.2314. He asked why it was necessary that it be passed today when there are no final court decisions indicating that the JOA's cannot

undertake the various activities we have described as possibly being prohibited by the Newspaper Preservation Act.

The question of timing is, I think, tied up in the above described chilling effect that the specific wording of the Newspaper Preservation Act has on the making of business decisions necessary to maintain healthy and competitive JOA newspapers. I don't know how long we can continue without doing things that other newspapers are doing to compete. I cannot say how my competitive position has actually been affected, from a dollar and cents standpoint. I do know that we have been hurt by direct mailers and that the coming technological changes could well hurt us more if we are not able to participate.

How long our newspaper can postpone a decision to undertake the necessary competitive activities to ensure our health and vitality, even in the face of the chilling effect of the specific wording of the Newspaper Preservation Act, is something that is not subject to exact measurement. But I do not believe that Congressional intent, as manifested in the Newspaper Preservation Act, would be served by waiting until a JOA paper was faced with a financial crisis or a huge anti-trust judgment before the problems inherent in the current wording of the Newspaper Preservation Act should be addressed by Congress.

If Congress chooses to address this problem only after its potentially devastating effects have actually been felt, it is likely that several JOA's newspapers will have suffered great losses and, possibly, their very ability to continue in existence will have been harmed, and this is clearly contrary to the Congressional intent of the Newspaper Preservation Act. The public policy of the United States, as enunciated by the 91st Congress in 1970 in adopting the Newspaper Preservation Act, was that the preservation of two separate and distinct news and editorial voices in the JOA cities was an important public concern. This concern is no less real today than it was in 1970. I do not believe that this Congress can afford to find out whether or not this problem can wait to be cured. Waiting could be akin to the act of closing the barn door after the horse has escaped.

The greatest concern to me, from a timing standpoint, is in the electronic publishing area. Technology moves so fast today that I cannot predict when it will become economically feasible to provide news and advertising to the home electronically. However, if I am not in a position to stay on top of this technology and to move quickly when it becomes available, I fear that other people, such as national newspapers, might well move into my city and usurp the market for this kind of service. No one can say whether this is a real fear or not, but the possibility certainly exist.

In summary, the question of timing is one of judgment. The current chilling effect of the Newspaper Preservation Act is clear. How much longer the JOA newspapers can continue to operate with this effect is not clear. For me it must be resolved on a basis of public policy and Congressional intent. If public policy is as enunciated by Congress in 1970, then S. 2314 must be adopted now as the Act as now worded acts in a manner wholly inconsistent with that policy.

The last point I would like to address was raised by the succeeding panel testifying at the hearing on June 10, 1986. By citing only one example, I am afraid that the panel may have left the impression that JOA newspapers have utilized their anti-trust exemption to pare their news and editorial staffs to the bone, thereby achieving a windfall gain never intended by the Newspaper Preservation Act.

While I cannot speak for other JOA newspapers, our experiences would indicate just the opposite is true. The news and editorial side of The Tulsa Tribune and the Tulsa World are highly competitive. To enhance their competitive positions, each paper has vastly expanded their news and editorial employees during the

sixteen years since the passage of the Newspaper Preservation Act. This expansion has occurred at The Tulsa Tribune in the face of static circulation growth.

The following chart shows the relative increase in newsroom and editoria' employees for The Tulsa Tribune and Tulsa World for 1970 as compared to 1985, and the relative circulation changes for each newspaper, including the Sunday Tulsa World (under our JOA, only the Tulsa World publishes a Sunday paper):

	News & Editorial Employees 1970	News & Editorial Employees 1985	Percentage Increase	Circulation 1970	Circulation 1985	Percentage Increase
Tulsa Tribune	75	109	45%	78,124	79,023	1%
Tulsa World (daily)	93	122	42%	111,594	135,656	22%
Tulsa World (Sunday)	<Employees are not allocated separately to the Sunday paper>			179,780	231,893	29%

I think the Tulsa newspapers' commitment to maintaining the highest quality journalistic standards and to providing the greatest possible service to our community is being kept to the extent that we continue to hire more and more people to provide news and editorial information for Tulsa and eastern Oklahoma. The Tulsa Tribune and the Tulsa World base their hiring decisions on the number of people that are necessary to give proper coverage to the community and its activities. Because our community has grown, The Tulsa Tribune has hired more and more reporters, even though our circulation has been virtually unchanged. This was necessary both to cover our growing city and to effectively compete, from a news standpoint, with the Tulsa World. We believe this to be in keeping with the spirit of journalism and the Congressional intent in the adoption of the Newspaper Preservation Act.

In conclusion, I would reiterate that all that is being asked for in connection with S. 2314 is the right of JOA's to compete in this ever changing business environment in the same way that one owner newspapers are allowed to compete. We don't want special privileges, we only want to be able to do that which is done in most cities in America. If the Newspaper Preservation Act becomes a stone around our neck as far as our ability to compete is concerned, its purposes will be frustrated and the possibility that more and more JOA newspapers will either cease to exist or become part of chain operations grows.

Senator HATCH. Thank you, Mr. Gallivan.
Mr. Mortimer, we will now turn to you.

STATEMENT OF WILLIAM JAMES MORTIMER

Mr. MORTIMER. Thank you, Senator Hatch, members of the committee, Senator Simon, Senator DeConcini. My name is William James Mortimer. I am the publisher of the Deseret News in Salt Lake City, UT. Together with the Tribune, whose spokesman, Mr. Gallivan, you have just heard from, we form the Newspaper Agency Corp., a joint operating agreement or, as you have heard expressed, a JOA.

I am here today to urge you to enact this proposed amendment to the Newspaper Preservation Act because I am convinced that the continued vitality of my newspaper, like many others, depends on clearing up the ambiguous language in the act.

I will not go into detail in this statement, because my more detailed statement has already been filed with the committee.

I would like to point out, however, at the outset that this coming Sunday the Deseret News will note its 136th anniversary of continuous publication. We are very proud of this record and with your help we plan to be around for many more years to come.

There is no question that the survival of our independent editorial and reportorial voice stems directly from the cost savings realized by the merger of certain of our purely commercial functions with the Tribune in 1952. Our joint operating agreement has worked so well that we did not hesitate to renew it in 1982 for another 30 years, consequently our public in Utah continues to benefit from the availability of two high-quality newspapers, and I am not giving an empty boast when I say high-quality because both our newspapers are Pulitzer Prize winners.

Nevertheless, we view the future with some alarm. The ambiguity, the imprecision of some of the Newspaper Preservation Act's language may force us to restrict the use of new technological developments and specialized marketing techniques which are available to our single newspaper colleagues and which make the difference between success and failure in our fast-pace world of information dissemination.

In our business, if we do not stay even with or ahead of the competition, our decline is all but assured. We have always believed and we have relied on the legislative history of the act that Congress intended JOA's to be free to engage in whatever legal, nonpredatory business activities were available to single-owner papers.

The problem is the act states what JOA's cannot do, rather than what they can do. It also enjoins us, as you have already heard, by definition to use only newsprint paper, although Congress could not have intended to limit newspapers to materials available in 1970 or in any other way to freeze the newspaper's development at its 1970 level.

So you say if we believe that the act implicitly allows these things, why do we not just let the chips fall where they may. Unfortunately, our pockets are not that deep. We cannot afford to spend perhaps as much as $1 million, as some have done, winning frivolous antitrust lawsuits, let alone the treble damage award a

questionable court decision might rise to, and there is always the possibility of criminal prosecution. That, as you can well imagine, is wholly unacceptable to many publishers and particularly alarming to the ownership of my paper, which is The Church of Jesus Christ of Latter-day Saints.

In my view, our efforts to keep healthy and competitive so that we can continue with the Salt Lake Tribune to provide our readers with first-rate editorial and reportorial choices should not be fraught with such dangers. Congress could not possibly have so intended.

This proposed amendment will simply serve to remove technical obstacles to the full realization of Congress' original intent to keep the press vibrant and alive in America. I respectfully request your approval of S. 2314.

Thank you very much.

[The prepared statement of Mr. Mortimer follows:]

STATEMENT OF WM. JAMES MORTIMER, PUBLISHER - DESERET NEWS

Senator Thurmond, Members of the Committee:

My name is Wm. James Mortimer. I am the publisher of the Deseret News which together with the Salt Lake Tribune forms the Salt Lake City Newspaper Agency Corporation, a joint newspaper operating arrangement. I would like briefly to describe the circumstances which have historically made our JOA a necessity, in order to give you some insight into our firm support for the Newspaper Preservation Act and the proposed amendment to the Act which is pending before you.

The Pulitzer Prize-winning Deseret News, which is wholly owned by The Church of Jesus Christ of Latter-day Saints was founded on June 15, 1850, and next Sunday we will note our 136th anniversary. Beginning in 1952 we published a Monday-Saturday daily newspaper, and added a Sunday newspaper in 1983.

We are, by the way, a metropolitan newspaper and not an ecclesiastical press organ of the LDS Church, which produces several church-oriented publications. We do publish on Sunday a supplement which contains news of the Church. Because our owner, the Church, has a significant presence in civic affairs in the region of our distributions, it is not surprising that the Deseret News is encouraged to be actively involved in the sponsorship of many scholastic, cultural, civic, public service, and sports programs.

Today we operate on a stable financial basis in cooperation - in the literal sense of the word - with the vigorously competitive and aggressively independent-minded Salt Lake Tribune, but it was not always so. For some years prior to 1952, the Deseret News faced extreme financial hardship because costly efforts over some five years to reverse damaging declines in circulation and advertising revenues had failed. We either had to cut down our expenses drastically or find some other way of doing business. The solution for our troubles came in the form of joining production and commercial forces with our competitor, the Salt Lake Tribune. There is no

question that the survival of our independent editorial and reportorial voices stemmed directly from the cost-savings realized by the merger of certain of our purely commercial functions with the Tribune's. Along with the preservation of our individual news voice, the return to fiscal health, made possible by the JOA, assured the public that the Deseret News would be able to continue its vigorous participation in public affairs as a responsible corporate citizen dependent for its very existence on a well-informed, energetic and diversely-opinionated public.

This felicitous state of affairs faced a serious threat in the late 1960s when the Supreme Court in its Citizen Publishing case outlawed similar economies of scale as practiced by the JOA in Tucson, Arizona. My colleague, John Gallivan, publisher at the time, and now publisher emeritus, of the Salt Lake Tribune, estimated that the Court's decision would require the duplication of a previously-shared $2.2 million cost which would cripple independent ownership of one or the other of our newspapers.

Enactment of the Newspaper Preservation Act, which both of the Salt Lake City papers heartily supported as a simple matter of survival, saved the day and assured the Salt Lake Valley and its environs, with a current population of 1,000,000 of two high-quality (we've both won Pulitzers), fiercely independent newspaper voices. Anyone who questions whether we really do go our separate editorial ways need only survey a few editions to determine that Utahns and their neighbors get a highly-provocative, richly-varied diet in their daily newspapers.

When 1982 and renewal of our JOA rolled around, we enthusiastically opted for a continuation of our relationship with the Tribune, which meant the continuations of our existence and the accompanying perpetuation of multiple editorial and reportorial voices for our local and regional readership.

The problem with this otherwise glowing success story - and by that I mean success for the public as well as

the papers - is the shadow of doubt and ambiguity we believe we operate under concerning the lawful scope of our joint activities under the Newspaper Preservation Act. Perhaps even more than other businesses, newspapers must keep on top of fast-paced technological developments and increasingly sophisticated marketing techniques to stay healthy, interesting and competitive in the kaleidoscopically changing information dissemination industry whose hallmark is assuredly creativity. It hardly seems necessary to observe that a veritable media explosion in recent years has made the world of 1970 when the Act was passed an all but irrelevant antique relic in terms of today's virtual technological supermarket in which both the so-called print and electronic media must make careful choices. Restraints on our ability to plunge into that marketplace, with all our creative talents and techniques fully engaged, represent more than an inconvenience. In this business, if you do not stay even with or ahead of the competition, your decline is all but assured.

We have always believed, and with good reason based on the legislative history of the Act, that Congress intended that JOAs be free to engage in whatever nonpredatory business activities were available to a single newspaper. No other interpretation makes sense because, quite simply, if a healthy newspaper is going to fare worse in the marketplace because it took on a failing newspaper as a commercial partner than if it carried on alone, the concept of a JOA is going to be demonstrably unattractive.

The problem is that the Act is drafted in negative rather than positive terms. Thus, it states, I believe in Section 4, what JOAs cannot do but not what they can do. Also, the Act talks about use of newsprint paper in the definitions section, although nothing in the legislative history suggests that Congress intended to limit newspapers to materials available in 1970. Again, it is wholly illogical for Congress to free up newspapers in straightened circumstances to take advantage of economies of scale and the like through commercial association with a healthy partner and then impose artificial

restraints. In other words, the Act is, in our view, meant to be organic, a blueprint, if you will, for infusing the newspaper business with new and continuing life.

The shadow that I alluded to a moment ago is how I characterize the ramifications of this ambiguity and seemingly anomalous statutory language. We could be at the mercy of disgruntled competitors who can use antitrust laws as an effective weapon to discourage our use of innovative techniques such as total market coverage editions or electronic publishing, out of fear that (1) a court will erroneously outlaw such endeavors - as one district court has in a case dealing again with the Tucson JOA - exposing us to treble civil damages and the frightening potential for criminal prosecution, and (2) right or wrong, bogus claim or not, our corporate treasuries will be asked to foot the bill for enormous attorneys' fees and other costs. I understand, for example, that the San Francisco Chronicle, which is a member of a JOA with Hearst's San Francisco Examiner, spent $1 million in fees in a winning effort.

No one should take the chance of such exposure, we least of all. Although ours is a prominent news voice in the region, our circulation and advertising revenues, while reasonably healthy, cannot fund such litigation. And, as you can well imagine, even the potential for criminal sanctions is wholly unacceptable to our ownership.

In our view, our efforts to keep healthy and competitive so that we can continue, with the Tribune, to provide our readers with first-rate editorial and reportorial choices, should not be fraught with such dangers. More importantly, Congress could not possibly have intended to afflict JOA members with such onerous choices. The proposed amendment will simply serve to remove technical obstacles to the full realization of Congress' original intent to keep the press vibrant and alive in America. We respectfully request your approval of S. 2314.

June 10, 1986
Before the Committee of the Judiciary
United States Senate

Senator HATCH. Thank you very much, Mr. Mortimer.

We will now turn to you, Mr. Barnett.

Senator SIMON. Mr. Chairman, if I might just interrupt for a moment. Unfortunately, I have to go to another meeting, and will not be here for the question period. My concern is we have more and more newspapers owned by fewer and fewer people. Does this legislation accelerate that trend, does it not have any impact, does it have the opposite impact? That is a very fundamental question that I would like to have answered in my absence.

Thank you, Mr. Chairman.

Mr. GALLIVAN. Does the chairman wish me to comment on Senator Simon's question?

Senator HATCH. Let us wait until the end of the opening statement. We will make sure that we address that question.

Mr. GALLIVAN. I believe his question will be answered in testimony.

Senator HATCH. Mr. Barnett?

STATEMENT OF HOWARD G. BARNETT, JR.

Mr. BARNETT. Thank you, Mr. Chairman and other members of the committee. I am Howard Barnett, the executive vice president of the Tulsa Tribune Co., which is the publisher of the evening daily newspaper in Tulsa, OK, the Tulsa Tribune.

As you have my prepared statement in the record, I will try to be very brief in these remarks.

Since 1941, we have been part of a joint operating arrangement with the morning newspaper in Tulsa, the Tulsa World. We are both family controlled and independent newspapers and to the point of Senator Simon, we are very proud of our independence and believe very strongly that the Newspaper Preservation Act has helped us to preserve that independence.

Through the Newspaper Preservation Act, we have been able to continue to provide two strong, very competitive news and editorial voices for Tulsa and eastern Oklahoma. But as you have heard, since the passage of the Newspaper Preservation Act of 1970, there have been many changes in both the newspaper and the advertising business in general.

There are new advertising media, news technologies and other matters that you have heard about. There are also on the horizons new technologies which will undoubtedly further change the businesses we are in.

As has been articulated before this, the specific wording of the Newspaper Preservation Act raises questions about our ability to do what one-owner newspapers can do in response to these changes in our business.

As a relatively small operation, worrying about how the act will apply to actions which are normal newspaper activities in 1986 puts a heavy cloud on our ability to compete, but we believe the intent of the Newspaper Preservation Act is clear. The fear of enormous costs of potential antitrust litigation makes us weary of undertaking actions which are appropriate to meet our competition in today's business environment.

To the extent our competitive position is thereby eroded, we believe that the true purpose of the act, to preserve separate, strong news and editorial voices, is actually being undermined. All we ask is to be able to compete in the same way that one-owner newspapers do. We believe that this amendment accomplishes this purpose and it is therefore consistent with the original congressional intent.

Thank you.

[The prepared statement of Mr. Barnett follows:]

STATEMENT OF

HOWARD G. BARNETT, JR.

EXECUTIVE VICE-PRESIDENT

TULSA TRIBUNE COMPANY

S. 2314

SENATE COMMITTEE ON THE JUDICIARY

JUNE 10, 1986

Mr. Chairman and members of the Senate Committee on the Judiciary, my name is Howard G. Barnett, Jr., and I am the Executive Vice President of the Tulsa Tribune Co., the company responsible for the news and editorial content of the Tulsa Tribune. My statement today is in support of S. 2314, a bill to amend the Newspaper Preservation Act. At the outset, I would note that I believe the amendment to be of a technical nature, in that it does not really expand the antitrust exemption provided by the Newspaper Preservation Act, but merely clarifies the language of the Act to comport with Congressional intent.

The Tulsa Tribune is a daily afternoon newspaper. Since 1941, the Tulsa Tribune has been a part of a joint operating agreement, or JOA, in partnership with the Tulsa World. The Tribune and the World are both independently owned and operated publications. Neither newspaper is a part of a chain, or the owner of other media properties. In 1941, faced with the imminent failure of at least one, if not both newspapers, the owners of these two newspapers followed the lead of several other publications by entering into a commercial merger of their properties, while each continued to provide, independently, the news and editorial content of its own newspaper. Newspaper Printing Corp., in which the Tribune and the World each own stock, was formed to conduct all of the commercial operations for both newspapers.

Thus, our commercial operations are conducted jointly like a so-called one owner newspaper, but we continue to provide two strongly competitive news voices for the City of Tulsa and eastern Oklahoma.

It is my understanding of the Neswpaper Preservation Act that Congress recognized a JOA as a commercial merger, where at least one of the newspapers had been in a failing condition at the time of entering the JOA. Also, Congress intended to make a JOA subject to the same laws as a one owner operation. The Act specifically states that newspapers in a JOA have no greater rights than would a one owner operation, and that any action which would be unlawful for a one owner operation, would similarly be unlawful if conducted by a JOA. Thus, a JOA was to be considered the same as a one owner operation - but with the added public benefit of maintaining two distinct and separate news voices.

The two newspapers in Tulsa have been advised by our counsel, however, that legal questions have been raised as to our engaging in certain activities which are common in the newspaper industry. One of these is a marketing technique referred to as total market coverage, or TMC. This involves the newspaper guaranteeing to the advertiser or advertisers that it will deliver the advertisements to every home or apartment in a postal zone, or zones, or even an entire city. The purpose of this is to meet competition from so-called direct mail companies. Daily and weekly newspapers all over the United States engage in TMC marketing. Only JOA publications have been singled out as possibly being precluded from such activities.

Another area of concern to us is in electronic delivery of part or all of our newspaper. Present technology would enable a customer or subscriber to receive any part of a newspaper via cable television with a printer attachment. Newspapers may, and do, lease channels on local cable networks, and provide news and reportorial services electronically to the home. Advertising can also be displayed through the same medium. The use of printer attachments is a more advanced technology, which

is now available, and progressing to a level of affordability for the homeowner. Also, new technology is likely in the future which will make electronic delivery of the newspaper practicable and desirable.

As I just said, some of the technology is here, and a number of newspapers are jumping into this new method of distribution. Once again, however, our counsel has expressed concern about what appear to be ambiguities in the Newspaper Preservation Act.

It is my understanding that S. 2314 would clear up these ambiguities, without going beyond the intent and purpose of the Newspaper Preservation Act. That is why I referred to the language of S. 2314 as providing technical amendments to the Newspaper Preservation Act. The key is that passage of S. 2314 would remove any cloud on JOA operations that would place us in a position of a second class citizen among newspaper publishers. If other daily, and weekly, newspapers can have TMC products and electronic delivery of the newspaper, denying like operations to a JOA would, in effect, work against the intent and purpose of the Newspaper Preservation Act. Loss of key advertising, and inability to keep up with our competitors, would certainly diminish our resources, and would adversely affect our ability to continue to provide two separate news voices to our communities. We just want to be on a level playing field where all newspapers can compete equally, and not be excluded as a JOA from participating in present day marketing techniques on the argument that the Newspaper Preservation Act would preclude such activities.

Please note that we do not for one moment concede that we are, in fact, barred from such activities. We believe the Newspaper Preservation Act grants us such authority, and does not discriminate against us. But, as relatively small operations, without the resources of other newspapers or media companies, we are loathe to incur the tremendous costs which would be associated with antitrust litigation. Winning in such cases can turn into Pyrrhic victories, where litigation related costs are concerned.

Mr. Chairman, since Congress enunciated its purpose of preserving separate news and editorial voices in passing the Newspaper Preservation Act in 1970, I must hope that this Congress will keep faith with this goal by enacting S. 2314, and enabling joint operating agreements, in Tulsa, Salt Lake City, and other cities to continue to engage in a full range of newspaper activities. Only in that way can we continue to provide to our communities the separate voices, as intended by the Newspaper Preservation Act.

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Senator HATCH. Thank you, Mr. Barnett.

We will now turn to you, Mr. Thieriot.

STATEMENT OF RICHARD THIERIOT

Mr. THIERIOT. Thank you, Mr. Chairman and other members of the committee. I have also submitted a prepared statement.

Senator HATCH. Without objection, all of your statements will go in the record as though fully delivered.

Mr. THIERIOT. There is one point that I would like to emphasize here. I think that, in the minds of some, there is a question as to how immediate the need for this legislation is, because I think there is a sense that perhaps the Newspaper Preservation Act language has already given joint operating agreement newspapers too much competitive advantage.

With regard to San Francisco, at least, that most certainly is not the case. Over the past 15 years, the circulation of the San Francisco newspapers has increased roughly 2 percent, while around us our very healthy, very strong surburban competition has been growing much more quickly.

In San Jose, I think the figure is 22 percent; in Santa Rosa, 50 percent; the Contra Costa Times has grown over 100 percent. Not only are they growing, they are very meaningful, powerful competitors, because the papers in Santa Rosa and Palo Alto and San Rafael are actually owned by the New York Times, and the Chicago Tribune and Gannett, and down in San Jose, Knight-Ridder. These are very big, strong, substantial competitors, and they all have developed a total market coverage vehicle, which is one of the competitive tools we are seeking here.

They have developed extremely sophisticated and effective total market coverage vehicles for their own newspapers. As a result, no matter what we do, our advertisers are forced to turn more and more to these TMC vehicles of our competitors. We are afraid to offer the same kind of section because we are afraid that we will be sued if we do.

As a result, to this date the concerns of our attorneys have prevented us from offering the same kind of vehicle that our competitors do. We do not feel that this was the intent of Congress when it wrote the Newspaper Preservation Act.

We feel it was the intent of Congress that we should be able to compete using all the tools that our competitors are allowed to use. And that is all that we are seeking with this legislation.

Thank you very much.

[The prepared statement of Mr. Thieriot follows:]

'STATEMENT OF RICHARD THIERIOT, PUBLISHER

SAN FRANCISCO CHRONICLE

Senator Thurmond, Members of the Committee:

My name is Richard Thieriot. I am the Editor and Publisher of the San Francisco Chronicle, a daily newspaper which has been in existence continuously for more than 120 years. The paper was established by my great-grandfather, M.H. de Young, and to this day ownership of the Chronicle is held entirely by and for the descendants of the founder.

At the beginning and also today, family members have an active role in the management of the paper. My father, the late Charles Thieriot, who preceded me as Editor and Publisher, appeared before this very Committee in 1967 to support the legislation which was eventually passed in 1970 as the Newspaper Preservation Act (NPA).

* * *

As a representative of the Chronicle, I am one member of a group of independent Joint Operating Agreement (JOA) publishers who support the passage of S.2314 which would amend the NPA in two technical, but nonetheless important, respects.

There is already a record before you concerning important aspects of the proposed legislation -- the statement by Senator Hatch upon introduction of the bill and the testimony of other JOA publishers. The remarks of these gentlemen admirably sets forth information about the reasons for the enactment of the NPA in 1970, the stewardship of the 44 or more JOA publishers during the 15 years that the Act has been on the books, and the economic and journalistic conditions that have confronted and now confront daily newspapers, particularly in our cities. Except to say that I concur in these statements already made, I want to direct my own remarks principally to why I think S. 2314 is a necessary amendment and why this is so specifically in the case of my own paper, the San Francisco Chronicle.

* * *

I suppose it is a fair question if you ask why it was not enough that the Congress passed the NPA. In short, why are we back for more? I have to start by saying that the original legislation was indeed a boon -- not only to the JOA publishers but also to the communities which we serve. I truly believe that the NPA has been effective in keeping alive diverse editorial voices in communities where otherwise there would have been but a single voice. That was, of course, the objective of the NPA, and it was something very important to attain in our society where we depend upon the wide dissemination of ideas and spirited debate to achieve our political goals and aspirations.

As you gentlemen know, it was a prerequisite under the NPA that only one of the two papers in any joint arrangement was likely to remain or become a financially sound publication. In San Francisco, both newspapers had been losing money steadily prior to 1965 when we activated our JOA. We at the Chronicle thought that that was a rather rocky financial basis for starting a new joint newspaper enterprise. On the other hand, our critics predicted that the combination of the business resources of San Francisco's two principal newspapers in a joint operating arrangement would be an awesome force driving competitive papers from the field. In playing out this economic drama, neither point of view has absolutely prevailed.

In actual experience the Chronicle's ability to operate under a JOA was indeed beneficial in overcoming the kinds of financial difficulties that my friend Jack Gallivan of the Salt Lake City Tribune has so ably described as having impacted metropolitan newspapers throughout the country. At the same time, our being a JOA paper has by no means ended newspaper competition in the San Francisco Bay Area. Exactly the reverse is true. Competition has been more intense than ever, and I believe that many of the papers in our area are attaining new highs in circulation and advertising volume.

As people in the San Francisco area realize, the Chronicle is not a newspaper confined to a single city or county. Less than 23 percent of our daily circulation is in San Francisco proper. As a metropolitan paper our market is very much the same geographically as what the San Francisco television stations call their area of dominant influence (ADI), by and large those ten California counties all but one of which touch San Francisco Bay. In that market, we have over 80 percent of our total circulation, and that is where our economic battles are won or lost.

Let's look at this market. In it are more than 20 other daily newspapers, approximately 19 TV stations, more than 65 radio stations, as well as uncounted weekly newspapers, shoppers and like publications. We compete head-to-head with these other media outlets since we sell the same thing that they do, advertising.

And how are we doing in the battle? Well I am not complaining because I always promise myself that we are going to do better. But we surely have not swept the competition from the field. The fact is that while the Chronicle's daily circulation has increased from 479,500 in 1970 to 550,200 in 1985, our household penetration in the ADI has actually declined in the same period from 25.3 percent of households to 20.6 percent.

Likewise, in advertising, it is notable that the largest of the papers in the ADI competitive with the Chronicle (the all-day San Jose Mercury-News) had by 1984 attained a daily advertising volume of 63.5 million lines per year. This compares with advertising volume in the daily Chronicle of 33.9 million lines for the same year. In this extremely important measure of newspaper operating success, the smaller "suburban" paper (the Mercury-News) is outperforming the larger "metropolitan" paper (the Chronicle) by more than 87 percent.

Finally, as to comparative circulation figures in the ADI, the combined daily circulation of the Chronicle and of our JOA partner, the San Francisco Examiner, has

increased from 682,900 in 1970 to 697,100 in 1985, an increase of just over 2 percent. In the same period the circulations of certain competitive dailies in the ADI have increased by such percentages as 22.5 percent for the San Jose Mercury-News, 29.3 percent for the Hayward Daily Review and 50 percent for the Santa Rosa Press Democrat.

The point that I am making is that newspaper competition against the JOA papers in the San Francisco Bay Area is indeed alive and well.

* * *

We need amendments to the NPA so that we and other JOA's will be able to adapt to changing market conditions and thereby continue to compete effectively. Specifically, we need to be able to employ the same technological and marketing innovations that many other publishers already put to good use for the benefit of their readers and advertisers. For example, it has become increasingly commonplace to print certain newspaper products on slick paper which enhances color reproduction and otherwise makes the publication more attractive. And yet the NPA still specifies that a JOA paper is one that is printed on newsprint. Likewise, from a technical point of view, electronic transmission is a means of distribution already available to newspapers and this mode of transmission may become particularly important in the years immediately ahead, for example in connection with classified advertising. Surely JOA publishers ought to be set free of the anachronistic provisions of the Act which would limit us for all time to distribution solely on newsprint.

Turning to newspaper marketing changes that have become prevalent since enactment of the NPA, Senator Hatch in his remarks has referred to total market coverage (TMC). This method of serving advertisers who must reach a newspaper's non-subscribers is made possible by a combination of technological advances including computer applications that now permit us to match and sort recipients of a TMC product. In our market we compete with

broadcasters who on behalf of advertisers reach virtually every home in the ADI. The contest between newspapers and broadcasters can no longer remain a fair one if the publisher is deprived of TMC.

In one measure or another, many of our competitors have already advanced to the stage where they are employing these new newspaper methods that were simply not within the contemplation of Congress in 1970 when the NPA was enacted. We are concerned about the situation for very good reason. These competitors of ours in our own ADI are in many instances well-established and well-financed daily newspapers, including papers owned by such prestigious companies as the New York Times (Santa Rosa Press Democrat), the Tribune Company of Chicago (Peninsula Times-Tribune), Knight-Ridder (San Jose Mercury-News) and other newspaper chains. It seems fantastic to me that major companies such as these may have greater latitude than the independently owned Chronicle in serving their readers and advertisers with these new devices and techniques.

Our lawyers say they are prepared to litigate the uncertainties in the NPA that may impact our ability to use the new technologies and present-day marketing methods. They also say that by the trial of cases in the courts we may eventually succeed in arriving at solutions to the presently unresolved difficulties in the Act. In my judgment this is not a very promising way to proceed. The Chronicle has been engaged in litigation involving JOA matters for many of the years that have passed since the NPA was enacted. For the most part, these cases have come out successfully for us, but the cost has been very great, not only in money but in what we might have done to serve our readers and the community at large had we not been required to devote our resources to the defense of lawsuits. As an independent JOA publisher, I am convinced, based on my experience of these past years in court, that it is

necessary to find a way of clarifying key provisions of the NPA without going through further protracted proceedings which I believe are destructive to all concerned.

At the outset of my remarks, I said that we are a family newspaper. It is our proudest wish to remain so and also to remain independent of the large newspaper chains which recently have so materially increased their scope. There are risks in being one of the smaller companies engaged in publishing a major metropolitan paper. The Chronicle is the central and essential part of our enterprise and we must make it both a journalistic and financial success. We hope to do this by improving the newspaper and by devoting ourselves to fair and equal competition with other media. But we cannot do so effectively if we are burdened with the uncertainties that keep us from freely putting to work the fruits of technological advances and the new ways of doing business.

I believe that the passage of S. 2314 is necessary to an independent JOA paper such as ours because it will put us on the same footing as the single-owner newspapers with whom we must compete. I am not here to ask for a new or different kind of legislative relief but only for a clarification that the original NPA was, as I believe, intended by Congress to afford to JOA newspapers the same opportunity for competition as is available to single-owner newspapers. I earnestly ask that this honorable committee vote favorably on the bill.

June 10, 1986
Before the Committee of the Judiciary
United States Senate

Senator HATCH. Thank you.

Let us now turn to Senator Simon's question. Would the enactment of S. 2314 increase the likelihood of newspaper ownership be consolidated and therefore the likelihood that fewer individuals would control newspapers?

Would you like to respond to his question, Mr. Gallivan?

Mr. GALLIVAN. Yes, Senator. Senator Simon, the number of competitive cities in the United States, two newspapers or more competing has dropped since the Newspaper Preservation Act from 45 in number to 28.

Senator METZENBAUM. Twenty-eight?

Mr. GALLIVAN. Pardon?

Senator METZENBAUM. Did you say 28?

Mr. GALLIVAN. Yes, 28. I did not notice that Senator Simon had left. Senator Metzenbaum, it dropped from 45 to 28. I say this with full confidence. There is 1 losing newspaper in every one of the remaining 28 towns or 1 likely to fail. I know of only four towns left where there are two possibly profitable situations at the present time, and they are very, very questionable.

I predict that in another 10 years, there will be one newspaper in each of the remaining 28 which are for the most part large cities, there will be 1 newspaper left unless they join together to keep alive two voices under the Newspaper Preservation Act.

Since 1970, there has been a drop from 45 to 28 competitive cities, 21 joint operating arrangement cities remain. There were 21 that were blessed by the original Preservation Act—2 have come and 2 have gone in the meantime. The Preservation Act has proved itself as eminently able to maintain diverse voices in any given community.

Senator METZENBAUM. Would you expand upon that, Mr. Gallivan? Many of us have seen joint operating agreements come to pass and the claim made that there are independent voices, but there is a real question as to whether that is a reality.

I think in some cases that is the fact. In Dayton, I think they are totally different voices even though in that instance it is not joint operating, it is totally owned by the same company.

Mr. GALLIVAN. Yes.

Senator METZENBAUM. In Columbus, the Columbus Dispatch is pretty much squeezed out by the Citizen Journal under a joint operating agreement, and that paper is now gone. It is no longer extant.

Mr. GALLIVAN. That is right.

Senator METZENBAUM. What about this independent editorial opinion and whether or not one newspaper does not become the dominant one, it owns the plant and is able to do things more its way? You have a joint-operating agreement, as I understand it, in your community, is that right?

Mr. GALLIVAN. Indeed we do, Senator. The——

Senator METZENBAUM. How independent are you?

Mr. GALLIVAN. Well, I think you would only have to read the Salt Lake Tribune and the Deseret News, which have been the balancing factors in the State of Utah for over 100 years.

Senator HATCH. They are very independent.

Senator METZENBAUM. Do either of you ever criticize Orrin Hatch? [Laughter.]

Senator HATCH. As a matter of fact, they both spend quite a bit of time criticizing me. At least, that is the opinion of my staff. [Laughter.]

Mr. GALLIVAN. I cannot say often, but we have on several occasions not agreed with Senator Hatch and as strongly as we could express it have said so in our editorials.

Senator METZENBAUM. Are you both Republican papers?

Mr. GALLIVAN. The tribune is independent.

Senator METZENBAUM. Independently Republican? [Laughter.]

Senator HATCH. I think you should spend more time criticizing Senator Metzenbaum.

Senator METZENBAUM. Be my guest. [Laughter.]

Mr. GALLIVAN. I could recite line and verse of many, many issues on which we violently disagree, the Deseret News and ourselves. As far as the rest of the country is concerned, as I observe them, they are maintaining certainly two diverse viewpoints on the news, which is a very healthy thing, and for the most part I believe that they are maintaining diverse editorial opinions, not on purpose do they not see eye to eye, but very often there are editorial debates.

At any rate, the Newspaper Preservation Act demands an independent editorial, independent news gathering bodies, so the opportunity to be diverse is there and I believe it is respected.

Senator DECONCINI. Mr. Gallivan—if the Chairman would yield—when you say "it demands independence," do you mean physically that they be independent, not philosophically that they be different? Is that correct?

Mr. GALLIVAN. The editorial viewpoints must be maintained independently, is what the act says.

Senator DECONCINI. I am looking at my State and particularly Tucson, AZ, where there is an operating agreement——

Mr. GALLIVAN. Yes.

Senator DECONCINI. They certainly are independent. In Phoenix I do not know if they have an operating agreement.

Mr. GALLIVAN. No, that is single ownership.

Senator DECONCINI. Single ownership. I am trying to think of any place else in Arizona where they might have a joint operating agreement. I guess Tucson is the only place.

Mr. GALLIVAN. You raise an interesting question. Before the Newspaper Preservation Act, newspapers could go only one route and that was into single ownership in order for both papers to survive. Since 1970, since the adoption of the Newspaper Preservation Act, the number of newspapers in single ownership, combinations in single ownerships have dropped from 150 to 87. The increase in profit, of course, is enormous when you drop one metropolitan news gathering organization and one full circulation distribution system.

Senator DECONCINI. Thank you, Mr. Chairman

Senator HATCH. Thank you.

Senator DECONCINI. I have some other questions but I will wait my turn.

Senator HATCH. Let me just ask a few questions. One of the primary reasons for the legislation is because total market coverage,

which is a new advertising strategy, was not contemplated or used in 1970 when the Newspaper Preservation Act was enacted.

Some are apprehensive that permitting JOA's to employ total market coverage will allow them to achieve virtual monopolies in display advertising. Would consumers, advertisers or competing local papers be harmed by allowing JOA's to employ total market coverage?

Mr. GALLIVAN. Senator, I think that is best answered by looking to those markets that have two newspapers under single ownership, and there I think you will discover that the suburban papers, the weekly newspapers within the circulation area of the metropolitan dailies have prospered and have grown more rapidly than the two newspapers in the town offering total market coverage.

Certainly our market has not suffered as far as suburban strength is concerned and weekly strength. Since 1970, the Salt Lake Daily Tribune and the Deseret News have lost 11 percent circulation. We have dropped from 191,000 combined to 171,000 combined. In the meantime, the dailies in Ogden and Provo and Logan and now in St. George, UT have gone from 69,000 total circulation to 111,000, and that is a gain of 62 percent. But the weeklies have gone from 44,000 to 194,000, the weeklies within our area, our primary market area. The weeklies have gained 400-plus percent.

Senator DECONCINI. Mr. Chairman, would you yield?

Senator HATCH. Yes.

Senator DECONCINI. How much of that is due, do you know, to the fact that the weeklies and the smaller dailies tend to report more local news than the large newspapers in, say, Salt Lake City or Phoenix? That is true, I am told, in my area, and of course some of those large newspapers have now started to put out truly suburban sections just to compete with that——

Mr. GALLIVAN. Right.

Senator DECONCINI. Not trying to just do shoppers but purely on the news. They are coming back. Is that true in the Salt Lake area?

Mr. GALLIVAN. Senator, that is correct. I cannot quote you any figures that show that they are coming back. I can quote you figures that will show they are about holding their own.

Senator DECONCINI. Thank you.

Senator METZENBAUM. Mr. Chairman, before I go further in this line of questioning, I want to make it clear that I do not have a conflict of interest now but at one point of my life I would have had a conflict of interest. I was chairman of the board and a major stockholder of a chain of weekly newspapers and actually had a shopper down in Lakeland, FL on which we made a claim and settled the claim in favorable terms with the New York Times. So I am not unfamiliar with this subject, but I have no interest and have not had an interest for many, many years. I thought I ought to just make it clear that I did at one point in my life have such an interest.

Having said that, I am at a loss to understand why this bill would provide an exemption from the law for the weekly shoppers who would be precluded from bringing an action against the newspapers operating either singly or as a joint under a joint operating

agreement, and I do not understand why they should not have that right.

Mr. GALLIVAN. Well, Senator, the original Newspaper Preservation Act gives joint operating agreement publishers the same rights enjoyed by the single owner of two newspapers. That mostly involves the fixing of advertising and circulation rates, but they may not be predatory.

Senator METZENBAUM. Well——

Mr. GALLIVAN. It is those same privileges that are enjoyed by the single owner of a combination of newspapers that has kept us alive.

Senator METZENBAUM. Let us assume that if you went out and shopped and you gave a combined rate of so many cents an inch for an ad in the shopper as well as in the daily, would the shopper have a right to bring an action if the Hatch bill became law?

Mr. GALLIVAN. If that was predatory practice, yes.

Senator DECONCINI. Would the Senator yield for a further question?

Senator METZENBAUM. Yes.

Senator DECONCINI. Just on economics, Mr. Gallivan, I do not quite understand the need for this. There has been only a district court ruling on the subject matter, so what makes you think you cannot do that? Why are we confronted with this today before there has been a definitive interpretation that what you want us to change really needs to be changed?

Mr. GALLIVAN. Senator, I will let counsel, Mr. Holbrook, answer that question. We feel very confident that we are protected under the act as is, but it is costing us a bundle to prove it.

Mr. HOLBROOK. Senator, if I could just comment on Senator Metzenbaum's point: The act, in section 1803(c), says expressly that nothing contained in the chapter shall be construed to exempt from any antitrust law any predatory pricing, any predatory practice, or other conduct in the otherwise lawful operations of the joint newspaper operating arrangement which would be unlawful under any antitrust law if engaged in by a single entity.

So what the existing act does is preclude the joint newspaper operating arrangement from doing the kind of things that might well have been involved in the case that you have mentioned, Senator Metzenbaum, and this amendment in no respect attempts to take away that concept. All the amendment does is to provide the means whereby the newspapers can do what other single-owner newspapers are doing in a lawful sense.

Senator DECONCINI. But that is what this says.

Mr. HOLBROOK. Well, it states it in the negative, rather than in the positive, that is the point. It says you cannot engage in predatory conduct. It does not say the opposite side of it, that you can do what others can do, and that is one of the points of this amendment that is being proposed, is to put it into a positive context.

Senator HATCH. One of the problems is that even though you feel that the lower court case is wrong, you cannot afford, as newspapers struggling for survival today, to pay the hundreds of thousands if not millions of dollars out to prove them wrong. And you are not going to interfere with the antitrust laws with regard to predatory and price fixing——

Senator DECONCINI. If the Chairman would yield. Nobody likes to pay attorneys fees, and I cannot blame them. But I am struggling with this fundamental problem: Why are we here when we do not have any evidence of great attorneys fees that you have had to pay? Maybe you can submit to us some bills. Second, has there been a flood of litigation on the subject matter? Have you lost?

Have there been interpretations by the circuit courts or the Supreme Court—know there has been none by the Supreme Court, indicating that this is not as you read it?

Mr. HOLBROOK. I think Mr. Thieriot would be the one to answer that question. I would be glad to respond to it in a legal sense, but I believe he has some experiences that will be of real interest to you, Senator.

Senator DECONCINI. Thank you.

Senator HATCH. Mr. Thieriot?

Mr. THIERIOT. Thank you, Mr. Chairman. Senator, the history in San Francisco has been particularly turbulent and litigious. We have had to spend a lot of money defending ourselves in court because of what others consider to be the ambiguity in the law. We feel that the law is pretty clear; that we should be allowed to use all the tools that a single newspaper owner can use——

Senator DECONCINI. That is what it sounds like.

Mr. THIERIOT [continuing]. Such as the competitors I mentioned earlier. But apparently the law is written with sufficient ambiguity in it that our opponents have been able quite successfully to take us to court, to disrupt our operations, and to make us spend millions fighting them when our time could be spent——

Senator DECONCINI. How many times have you been taken to court?

Mr. THIERIOT. Over the last 15 years we have been taken to court three times by three different plaintiffs. It has cost us millions.

Senator DECONCINI. How much?

Mr. THIERIOT. Millions.

Senator DECONCINI. Well, $2, $3, $10, $15, $100?

Mr. THIERIOT. I am not sure, a number of millions of dollars.

Senator DECONCINI. In attorneys fees, judgments, or what?

Mr. THIERIOT. We never lost any of the cases.

Senator DECONCINI. So only in attorneys fees?

Mr. THIERIOT. In attorneys fees and in all the expenses that go along with the protracted litigation. As I say, over 15 years, three different plaintiffs, and our time in court was a number of years. Again, I forget exactly how many, but over 15 years it was probably a good 7 years of the 15 that were spent in fighting some form of litigation or other.

Senator DECONCINI. With three cases?

Mr. THIERIOT. Excuse me?

Senator DECONCINI. With three cases?

Mr. THIERIOT. Yes, three different plaintiffs.

Senator DECONCINI. And it cost you millions of dollars?

Mr. THIERIOT. Yes.

Senator DECONCINI. I would like to know how much and what cases they were.

Mr. THIERIOT. There were three different plaintiffs, one a newspaper——

Senator DECONCINI. You can submit that to us if you like.

Mr. THIERIOT. All right.

Senator DECONCINI. I would like to know what the severity is in your industry for your paper.

Mr. THIERIOT. I would be happy to do that.

Senator DECONCINI. Please go ahead.

Mr. THIERIOT. These uncertainties, and the danger of having to spend this kind of money to defend ourselves, has had a chilling effect on our operations. This effect has progressed to the point where—despite the TMC vehicles that our competitors are using all around us—our attorneys still have not felt they could give us the go-ahead to use that same vehicle to compete in turn. This is because they feel we stand a very good chance of finding ourselves in court again—for millions of dollars—for the fourth time.

The whole situation has become so onerous that it really ties our hands in a very meaningful way.

Senator DECONCINI. I would like to know what the severity is. I do not want to get into your prices and your books, but just general numbers on what the cases cost you both timewise and in attorneys fees or settlements.

Mr. THIERIOT. Yes.

Senator DECONCINI. Have any of you ever lost a case in this subject matter?

Mr. GALLIVAN. I do have testimony in point on the cost, however, of defense.

Senator DECONCINI. In the *Tucson* case, the joint operation lost but they did not appeal it and I do not know why. I wish they were here so that we could find out why. It seems to me that it is in your best interests to have an appellate court determination. If it is against you, then you can come and petition us to change it if that is what you want; if it is for you, it would help you immensely in future litigation, and threats, and your counsel in making a decision of whether or not to give you the go-ahead.

Mr. GALLIVAN. Senator, counsel can comment upon the *Wicks* case in Tucson. I would, however, like to read from Thurston Twigg-Smith, publisher of the Advertiser in Honolulu. This full statement has been filed, but this one paragraph I think helps to answer your question:

> We had antitrust litigation against our JOA in Honolulu just a few years ago and, although we prevailed, the cost just to my newspaper alone was stunning, well in excess of one million dollars. A few more such victories could put us back into a failing condition.

Mr. HOLBROOK. If I may, Senator, just from counsel's point of view, I am the regular outside counsel for the Newspaper Agency Corp., which is made up of the Deseret News and the Salt Lake Tribune, so I have been giving the advice that has kept these newspapers from doing the things they want to do.

The advice has not been given lightly. I have to recognize, as Mr. Mortimer has pointed out, that the antitrust laws have criminal ramifications and it is awfully hard to say go ahead and run a business risk when you are confronted with that problem.

As you well know, in the courts usually the courts will take a specific problem, as is the case with *Wicks*, and deal with that problem. The *Wicks* case now is sort of just languishing. It is back

down to the trial court, but there is no progress being made on either side with that case. It is still a pending case, but it is going nowhere.

Senator DECONCINI. My understanding is that there was a technical problem in the case that was resolved on appeal. There is a judgment against the Tucson newspapers and there is no enforcement clause in the judgment.

Mr. HOLBROOK. No.

Senator DECONCINI. Is that correct?

Mr. HOLBROOK. No, that is not correct. The case came back down to the district court and the district court entered a statement having to do with the issue involving a preliminary injunction, not in terms of any final judgments or on the merits. In the preliminary injunction, the court said that I am now advised that there are no slicks involved in the total market coverage product that is being distributed——

Senator DECONCINI. There are no what?

Mr. HOLBROOK. Slicks, that is——

Senator DECONCINI. Shoppers?

Mr. HOLBROOK [continuing]. Shopper kind of things, they call them slicks, they are printed on slick newspaper.

Senator DECONCINI. Thank you.

Mr. HOLBROOK. And the judge says there are no slicks in the product now, so I now conclude it is a newspaper publication within the meaning of the act. Now, that only went to the issue involving the preliminary injunction and neither side of the case, for whatever reasons they may have, I do not know because I am not involved in it, have seen fit to press that case on through the courts.

The issue involved in the case is not of the full scope of the issue we have before this committee and before the Senate, so we are kind of cherry picking in a sense. We solve this problem and then there are other problems, maybe down the road apiece some new competitive practice that others are doing that we are not able to do, and so it is a question of being involved constantly in litigation as the competitive processes developed, such as cable TV utilization.

So rather than to keep coming back to the Congress all the time or rather than to be constantly in court, or the third alternative, rather than to have advice given by lawyers like me that says to the client, hey, you had better not go out there and compete because you will be in big trouble maybe—I tell them it is lawful and my best judgment is it is a lawful thing you want to do, but there is a risk and it is that risk that Mr. Mortimer's principals, the owners of the Deseret News say we will not accept and that, based on our discussions, my client has said we cannot accept that kind of a risk.

So we are trying to cut through in a relatively simple way and simply say, look, the Congress intended initially to have a commercial merger, let us treat it as that and let us do under the language of the act what other single newspaper owners can lawfully do, nonpredatory conduct.

Senator DECONCINI. One last question: Has there been any decision by a district court—and if the *Tucson* decision has not done

that, I was under the impression it had but I am more than happy to stand corrected—that has ruled against the joint operation agreement?

Mr. HOLBROOK. The *Tucson* case—I have not made my point clear, and I am sorry for that, Senator—if you take the *Tucson* case as it presently stands based on the existing record, that judge has said in effect that if you put out a total market coverage product that contains so-called slicks, then you are in violation of the antitrust laws because the exemption is not applicable. Now, that really——

Senator DECONCINI. That is a decision?

Mr. HOLBROOK. That is a decision but it is not a final decision on his part, but it is at least the law of the case at the moment.

Senator DECONCINI. That was my understanding, that that is a decision of the district court.

Mr. HOLBROOK. That is correct.

Senator DECONCINI. Why do you not appeal this?

Mr. HOLBROOK. Because it is not a final order. It is in connection with a preliminary injunction phase of the case and it is not final in the sense that they would take that particular issue up on appeal.

Senator DECONCINI. Are you saying it is not appealable?

Mr. HOLBROOK. It is not appealable because it is not final.

Senator DECONCINI. OK.

Mr. HOLBROOK. And so they cannot get to the circuit court until it becomes final, and in the meantime all of us in the marketplace——

Senator DECONCINI. Are there any other such cases where there has been a final decision held in opposition to what you are attempting to do with slicks?

Mr. HOLBROOK. I know of no other case to that effect, sir.

Senator DECONCINI. Thank you. That is very helpful.

Senator HATCH. Let me ask a couple more questions here and then we will turn to another Senator. It is not that difficult for me to understand why you want to avoid oppressive litigation. We can correct the new advances in newspaper technology by this simple amendment to the bill.

Senator METZENBAUM. You talk about simple amendment. Would the chairman explain why he put in the language to eliminate "and delivered in whole or any part to readers"?

Senator HATCH. Because that permits JOA's to use total marketing coverage, rather than just delivery to subscribers. We are living in a modern age, Senator. These newspapers are upgrading and they are starting to have to compete with total delivery of media services through television, cable, et cetera. Some of them participate in that process, and this bill allows them to participate in our day.

Senator METZENBAUM. I am wondering whether or not it also evolves from the fact that a certain number of newspapers now are not delivering papers to their readers but, rather, are selling them to individuals who then distribute them in an effort to avoid the provisions of the Wage and Hour Act and other provisions?

Senator HATCH. I do not think that has anything to do with it.

Senator METZENBAUM. Is it not a fact that this is occurring throughout the country?

Mr. HOLBROOK. I know of nothing to that effect, sir. As a lawyer, I have never even had the issue presented. I will have to defer to Mr. Gallivan, though, who has been on the business side of this.

Senator HATCH. Do you know of any newspapers that are selling to individuals to avoid the wage and hour laws?

Mr. GALLIVAN. I do not, Senator.

Senator METZENBAUM. I can tell you in my own home city, the Plain Dealer is not delivered by the Plain Dealer, at least not in some areas of the city, but rather you make an arrangement with an independent dealer.

Mr. GALLIVAN. Well, that has been common practice, Senator, as you know. When I first got into the newspaper business some 50 years ago, most of our circulation was through distributors, but since then we have found that we are better able to serve our customers and better able to maintain our circulation through direct management.

Senator METZENBAUM. I know, but why do you need in this amendment "and delivered in whole or any part to readers"? You deliver your papers to your readers.

Mr. GALLIVAN. Oh, I see, Senator. Many of our advertisers, a great many of our advertisers are demanding 100 percent coverage of their advertising material in their neighborhood, if they are small advertisers, or in our total market area or in one of some seven zones that we maintain for distribution, and simply to meet their demand we want to be able to do what the competition does and beyond our paid circulation mail or hand deliver to the balance of the market whatever materials our advertisers ask us to do.

Senator METZENBAUM. Well, I am not comfortable with the answer, but I do not want to hold up the hearing. I know you have opponents who want to be heard and I think we had better let them——

Senator HATCH. I am going to turn to them next.

Mr. HOLBROOK. If I could make a comment here, sir, that would go to your question: In order to understand the language of the bill, it is necessary to put it into context with the language of the existing act. And the language that you are referring to has to do with a definition section of the act that defines what a newspaper publication is, and if you see that language in context, basically what it is saying is that the joint newspaper operation ought to be able to deliver a total market product.

Now, what the judge said in *Wicks* was that total market product has to be tested by the intent of the publisher to deliver advertising or deliver news, which I do not think was in the mind of Congress at any time as this act was initially passed.

So it is really a question of clearing up a very ambiguous definition and that language fits into that context.

Senator HATCH. Senator McConnell, was here earlier, but had a conflict and had to go to another meeting.

Let me just turn to Senator Specter who has one question.

Senator SPECTER. How many newspapers are covered by arrangements where they have joint marketing agreements at the present time?

Mr. GALLIVAN. Twenty-one.

Senator SPECTER. And how big a market share, if you know, of the entire Nation do those 21 agreements cover?

Mr. GALLIVAN. Oh, I can file that material with the committee, Senator. It would be very small.

Senator SPECTER. Well, I have asked two questions, Mr. Chairman. Thank you.

Senator HATCH. It is in the neighborhood of 5 percent, is it not?

Mr. GALLIVAN. Eight percent of circulation and 2 percent of newspapers.

Senator METZENBAUM. After the Detroit News and the Detroit Free Press, if that becomes a reality, how much will that go up?

Mr. GALLIVAN. Well, probably 1 percent.

Senator METZENBAUM. What is the total newspaper circulation of the country?

Mr. GALLIVAN. I have got that material here, Senator. You could proceed and I will look that up.

Senator HATCH. Let me ask another question. We have touched on this lightly. Another aspect of this bill involves printing on slick paper. The 1970 act limits JOA's to printing on newsprint. Is there any reason for the limitation to print purely on newsprint?

Mr. THIERIOT. Mr. Chairman, if I could respond to that, we think it was simply because at that time, in 1970, it was a logical and meaningful way to distinguish daily newspapers from other forms of publications, because in 1970 newspapers were published solely on newsprint.

Since then, marketing methodologies have changed drastically as newspapers have found new ways to compete. Newspapers use these slick paper sections because they allow very good reproduction and quality color, and, in general, do a much better job for their advertisers. This kind of section was not at all envisioned at the time the act was written.

Mr. Chairman, I would like to add one other thing in further response to Senator DeConcini's earlier question. We have looked over those reports we have with us, and the three suits I mentioned earlier covered 16 years from 1968. We have been involved in legal battles for fully 16 years since 1968 over JOA issues in San Francisco.

I was also reminded that we have also received a threat from another potential plaintiff who has said that, if we attempt to utilize a TMC vehicle in his marketplace, he will take us to court.

Senator DECONCINI. What is a TMC vehicle?

Mr. THIERIOT. I am sorry, that is the total market coverage product that tends to include the slick paper sections.

Senator HATCH. Let me just ask one more question. Mr. Holbrook, you represent the newspapers and are very learned in this area, would you explain the prospects for the electronic delivery of newspapers and how antitrust laws could affect JOA's in this particular area?

Mr. HOLBROOK. Yes, it ties into the discussion we are having right now. The definition of a newspaper publication says a publi-

cation printed on newsprint. It is my understanding, as Mr. Gallivan says in his filed testimony and in his brief statement here this morning, there are all kinds of breakthroughs that are taking place that might very well have newspapers delivered over cable, on a contained cable situation, not on an open channel to the home in one way or another, and there is a lot of experimentation taking place on that subject by other single-owner newspapers.

What we think this definition, the very, very thing that was mentioned by Mr. Thieriot, the change in slicks was not anticipated back when the act was passed, certainly it was not anticipated that the newspaper industry could have television as a means of distributing that paper. So it is an attempt to meet that problem.

Now, once again I have been asked the question and I am sure every lawyer at the table here, can you not do it anyway and we have said, well, it still has this very awkward language in the definition section and newsprint does not sound like television on its face.

There is a very good argument that can be made that the policy of the act, the idea that the Congress has adopted as a policy, the concept that we are going to do everything that is appropriate to maintain separate editorial voices in this country, keep the newspaper industry viable and alive through this means, but still you have specific language and so it is a true handicap to the newspapers keeping up with what is happening with electronic breakthroughs, and with computers, and all that sort of thing. It is this very idea that what we need is to have our hands not loosened so we can club somebody, because we will still have those severe restrictions on predatory conduct, but a way of putting us back into the competitive mainstream. That is what it boils down to.

Senator DECONCINI. On that subject, if the Chairman will yield, if you wanted to be in the competitive mainstream you could still do it by giving away your full newspaper and not just using slicks, right?

Mr. HOLBROOK. That is a very good point, but how are you going to get that full newspaper onto the person's doorstep? You see, the slicks get there——

Senator DECONCINI. That is my question. You could give that away like you do a slick.

Mr. HOLBROOK. We do give away the thing that we want to have on the total market coverage product, but the question is the mechanics of getting it to the person's home. When you mail your full newspaper, you see, that is a lot more expensive than it is to mail a few slicks.

Senator DECONCINI. My observation is that if you really want to compete, it would be so much better to give the public the whole thing—all your advertising and your news. You would be so much better off than the local little newspaper. You can give them the whole thing, but I guess that costs you too much money.

Mr. HOLBROOK. The costs are so enormous that you cannot possibly use that alternative. If that were a practical alternative, that would be a very good answer to the TMC problem. But when you are thinking of the cost of newsprint itself, printing a whole newspaper, when you are competing for TMC with one that sends out

through the second-class mailing privileges a very inexpensive slick product.

Senator DECONCINI. Mr. Chairman, I have to go to another hearing. I want to thank the Chairman for expanding the witness list at my request. I have questions for the other panel and two other questions I cannot ask here because of time. I ask that my opening statement appear at the beginning of these hearings and that the questions to the second panel be submitted at the appropriate time.

Senator HATCH. We will keep the record open for questions from all members of the committee.

Senator DECONCINI. I will ask a legal question. Maybe the Chairman knows this, having been a trial lawyer for many more years than myself.

Senator HATCH. I can say that the distinguished Senator is ribbing me just a little bit here.

Senator DECONCINI. I mean experiencewise. I am probably older than you are. I have not practiced law for 10 years. My understanding was that you could appeal a preliminary injunction. Am I incorrect?

Mr. HOLBROOK. Well, I think as a general rule the preliminary injunction would not be a final judgment. It would be in the normal sense. There are situations where you can appeal preliminary injunctions, I concur in that.

Senator DECONCINI. Is there any prohibition against Tucson newspapers do to that preliminary injunction?

Mr. HOLBROOK. The point is that the injunction in the *Tucson* case, as I mentioned earlier, was in fact dissolved, but it was the reasoning process that led to the injunction in the first instance when the judge understood there were slicks involved that has created this confusion in the holding. And even if you could take the preliminary judgment up on appeal, which in some instances you can and in some you cannot—my understanding in this case, since there is not even a preliminary injunction on the books other than the reasoning of the judge in the first instance, there is no way it could go up at this point.

Senator DECONCINI. I am confused on the case. I will have to read the case because I get different answers from you or at least I interpret them differently.

Mr. LEVIN. Senator, I am Morris Levin and I am an attorney and I represent the independent JOA publishers group and let me try——

Senator DECONCINI. I am sorry to be so dense.

Mr. LEVIN. It is very confusing.

Senator DECONCINI. I get different signals here.

Mr. LEVIN. In proceedings—and I am sure the other panel will expand on this—in proceedings before the Federal district court in Tucson, the judge issued an injunction ruling——

Senator DECONCINI. A preliminary injunction.

Mr. LEVIN. A preliminary injunction or an injunction ruling as part of a decision in which he talked about the Newspaper Preservation Act, slicks, and the amount of news material. He said in his ruling that he found the material being used by the Tucson newspapers in their JOA was not appropriate under the Newspaper Preservation Act and therefore he enjoined them from doing it.

They went immediately to the circuit court on a strictly technical basis. The Circuit Court of Appeals—I believe it is the ninth circuit—reversed only on the basis that there had not been a notice hearing——

Senator DECONCINI. Right.

Mr. LEVIN. Or an injunction. The case therefore went back to the Federal district court. The judge then issued a second ruling which my brother Mr. Holbrook referred to in which he said I do not think the issue is ripe at this time in that there are not sufficient factual matters indicating that the Tucson JOA is successful in getting slicks and such advertising into its paper, ergo the Green Valley Newspaper is not being harmed. I will therefore put this into abeyance until something happens that will raise it again. Now, that is my interpretation of the case.

Senator DECONCINI. That is very clear.

Mr. LEVIN. You cannot take that decision at this level up. There is nothing to take up.

Senator HATCH. That is right.

Mr. LEVIN. All you had to take up was limited.

Senator DECONCINI. Mr. Chairman, thank you. The Chairman has been more than fair in my request to have some of the other witnesses here. I want to thank you and your staff for making the arrangements on short notice. I know you have got other things to attend to as well. It epitomizes your fairness as the Chairman.

Senator HATCH. Thank you.

[The prepared statement of Senator DeConcini follows:]

PREPARED STATEMENT OF SENATOR DENNIS DECONCINI

Mr. Chairman, I welcome the hearings today on an issue that brings together two of the most important areas of the law—rights of the media and the interplay of those rights with the antitrust law. The Newspaper Preservation Act adopted some years ago with the highest intentions of assuring that the public have access to diverse editorial and reportorial voices in the written media. By and large, I believe the Act has worked well.

On the other hand, to preserve the ability of some marginal papers to publish, it was necessary to make amendments to the antitrust laws to permit these newspapers to conduct their business affairs in a manner, which, but for the exemption, would violate numerous aspects of the antitrust laws. The scope of the exemption was carefuly reviewed at the time of the passage of the Newspaper Preservation Act and any expansion of the exemption contained in the original version should be reviewed with care.

I look forward to the hearings today, we have a number of expert and distinguished witnesses who will appear on both sides of the issue. I'm sure the hearings will be most elucidating and educational.

Senator HATCH. I want to thank each of you for appearing before this committee. If any of you have additional material, we would be happy to put in the record.

Mr. GALLIVAN. Senator, may I make one more swift comment about our desire to be free to publish electronically. At the present time, there is a service called X-Press that is owned by Telecommunications in which we happen to have an interest partially, a third owned by McGraw-Hill Publications and a third owned by a company called Telecrafter. By satellite and cable, this service delivers all kinds of news to personal computers. Anyone who has a personal computer can subscribe to this particular service. If he has a word processor, he can copy this news that is delivered to

him, a state of the art—there are items on the shelf that would permit us to deliver into the living room a newspaper that would look altogether like the newspaper that is laid on the doorstep. If the demand comes from the general public for this sort of service, we would like to legally be able to meet that demand. We believe that we have that right under the original Newspaper Preservation Act, but it is mute on this particular point.

Senator HATCH. This amendment will make it much more clear.

Mr. HOLBROOK. Yes.

Senator HATCH. Thank you. I am glad to have that additional comment in the record. We will now move on to the next panel.

Our next panel consists of Mr. John P. Frank, of Lewis & Roca, in Phoenix, AZ. He represented the newspapers in the case of *Wick* v. *Tucson Newspapers* in 1984; Robert G. Picard, School of Journalism, Louisiana State University, Baton Rouge; and Richard Aginian, president of the Suburban Newspapers of America, Livonia, MI.

We are happy to welcome each of you here today. We will begin with Mr. Frank.

PANEL CONSISTING OF JOHN P. FRANK, ESQ., LEWIS & ROCA, PHOENIX, AZ, ACCOMPANIED BY ROBERT WICK; ROBERT G. PICARD, SCHOOL OF JOURNALISM, BATON ROUGE, LA; AND RICHARD D. AGINIAN, PAST PRESIDENT, SUBURBAN NEWSPAPERS OF AMERICA, LIVONIA, MI

Mr. FRANK. My name is John Frank, of the firm of Lewis & Roca, Phoenix, AZ. I have appeared before this committee many times on various bits of legislation. I was called on by the committee to appear on a Supreme Court nomination at one time.

I would like to amplify my own statement by adding the Matindale statement which is not here, and I will not burden you with the other details. We would also hope that you will keep the record open long enough for Mr. Wick and Mr. Fishman to put in their statements since they will not get——

Senator HATCH. We will be happy to put those statements in the record.

Mr. FRANK. Now, my task, Senator Hatch, is an extremely difficult one and I do embrace it. Senator Hatch is a deeply respected figure and I wish to undertake the task of trying to persuade you, sir, that this bill is unfortunate and that you should abandon it.

The Suburban Newspaper Association will speak, but they have just adopted a resolution in their national organization that if this bill would pass it would be the death knell of suburban newspaper publishing in America and they are deeply concerned. Mr. Aginian, their president, will speak on that theme.

We have been talking about a lot of things that are not really here. The question, Senator Hatch, the precise issue and the ultimate facts are that you are going to pass a bill under which the JOA's send no news content at all; they just blanket their communities with shoppers. They can make enough on the ads to cover their costs and that is the beginning of what we are talking about.

The sole question is, Are you going to allow the big downtown newspapers to scoop up all the advertisers, gather those ads togeth-

er and put them in something called a jacket and just mail them out free to everybody they can reach throughout northern Utah or southern Arizona, or wherever?

The practical consequence if they do that is that they will scoop out all the advertising and the small newspapers will quite likely be destroyed in the process.

Now, you are familiar, and I abridge rapidly, you know that the U.S. Supreme Court has held that joint newspaper operations violate the Sherman Act. A bill was passed to give an exemption to permit them to do an editorial job, but the intriguing point is that the legislative history, the committee report of the Senate committee, this very committee expressly, categorically in so many words said they could not do what they now want to do.

Senator Fong of Hawaii was floor leader on this matter and he was absolutely explicit, that this act did not reach and would not permit the free distribution of shoppers; the bill would not allow the shopper operation by these newspapers at all. So there can be no doubt that this was the most clearly possible meditated judgment on the part of this body when you adopted the act in the first place.

There is no technical development that makes any difference. They talk about, "we want to be able to send newspapers by television." I am a member of the board of directors of the largest encyclopedia in America. We want to be able to send the encyclopedia into homes, too. None of that is involved in the slightest degree.

The litigation they have been talking about does not relate to such things, much less touch on them. The sole question is whether, I repeat, whether you, in a country in which the cities are surrounded by small newspapers, whether you are going to take a bill and put it through, sir, in which you are going to jeopardize the existence of those small newspapers by encouraging the downtown papers to get all their advertisers and simply make the countries papers go broke by making free distribution of the ads.

This bill was hard fought when it was in the Senate before. Senator Hart of Michigan led the opposition. It was a close thing, and without the very careful limitations which were crafted in by this committee, the bill would never have passed in the first place. Now you are seeking—I do not mean you personally, but the sponsors of the legislation—to give carte blanche for annihilation of small newspapers. And while I cannot blame the big newspapers for their desire to monopolize the trade of the country, that is not exactly a matter of joy to the small newspapers. My client, Mr. Wick, has 30 small newspapers. There are countless others, the number of them in the suburban group is in the hundreds. These people are all directly jeopardized by allowing this monopoly opportunity which is the practical consequence of this bill.

It is true, and in the statement that you put into the record, Senator, you said that the construction given by Judge Browning, "effectively chills some JOA's and their commercial endeavors." That is exactly and precisely true and it ought to be true. These are endeavors which this body did not mean to permit. You did not mean to permit the downtown papers to monopolize the suburban trade and the statute does prevent it.

The question has been asked as to why there has been no further litigation. It is obvious. We are dealing with a Senate committee report which is as explicit as any could possibly be.

Now, your time is short. I can only say, Senator, that the JOA's of the country are doing just fine with the exemption that you gave them, which permits price fixing and tying and all of the other privileges which are denied to the rest of American industry by the Sherman Act. They have been given it. The result is that they are all prospering, is the plain fact of the matter. They do not need to wipe out the trade which is outside the city limits, and I respectfully submit that—indeed, if you have questions, I would welcome them, but I mean to be hasty—but I submit that you, Senator Hatch, if you are a friend of small enterprise in America, I do not think ever meant to do what this bill would do, which is simply to annihilate large-scale small business in the world of communications, and therefore my plea to you, sir, is to table the bill.

Am I making any headway?

Senator HATCH. There might be some additional questions for you.

Mr. FRANK. I would be very grateful, but let me say no more. I know you are running a tight schedule.

Thank you.

[The prepared statement of Mr. Frank follows:]

Statement Before The
Senate Judiciary Committee
On S-2314
June 10, 1986

John P. Frank

My name is John P. Frank of the firm of Lewis and Roca in Phoenix, Arizona. I have appeared many times before this Committee, appearing at the express request of the Committee as an expert on a United States Supreme Court nomination. I was the prevailing attorney in the United States District Court action which this bill seeks to set aside. For convenience, I attach as an exhibit to this statement my sketch in Martindale.

The Suburban Newspaper Association the other day adopted a resolution in New Orleans declaring that this measure would be the death knell of the suburban newspaper industry in America. Similarly, Mr. Robert Wick, the owner, and Mr. Jon Fishman, the publisher, of the paper which was the subject of the decision which this bill would erase, are here, would have wished to be witnesses, and hope that the record may be kept open for a reasonable period so that they may submit statements.

Turning to the substance of the legislation, the essential question is whether newspapers operating under Joint Operating Agreements (JOA) will be permitted to send bundles of advertising materials commonly called "shoppers," free, to nonsubscribers within their circulation areas. JOAs can make enough money on these shoppers, distributed free, so that they do not need subscribers. The practical effect will be to pull the advertisers out of the existing suburban papers and move them over to the free shoppers.

A word of background may be helpful: The United States Supreme Court has flatly held that Joint Operating Agreements violate the Sherman Act; see United States v. Citizens Publishing Co., et al., 280 F. Supp. 978 (D. Ariz. 1968), aff'd, 394 U.S. 131, 89 S. Ct. 927, 22 L. Ed. 2d 148 (1969), on remand, 1970 Trade Cases § 73,094 (1970). A Joint Operating Agreement is an arrangement under which two otherwise independent papers create a common entity to print the papers,

sell the advertising, collect the accounts and so on. This common entity uses a uniform price schedule and is, thus, the plainest possible form of price fixing between the two papers. The Supreme Court decision was 8 to 1, and the only dissenter rested on specialized grounds not generally applicable.

A "shopper" is commonly a 4-page newsprint sheet--a single sheet of paper printed on both sides and folded. It commonly contains dead copy--the name of John Wayne's horse, diet information, and so on; it may have a minor bit of local scheduling information, as for theaters. This jacket is filed with slick material and purely advertising circulars called inserts, preprints, or the like. This material is commonly folded into the Sunday newspaper and goes to the regular subscribers. There is no issue as to the legality of that kind of distribution to regular subscribers with the newspaper. The sole question is whether this jacket with its filler may be taken out of the newspaper and be distributed free and separate to nonsubscribers.

When the United States decided the Tucson Citizen case, this Congress was deeply concerned. A measure was adopted, known as the Newspaper Preservation Act, 15 U.S.C. § 1801-04. As the copious legislative history clearly shows, the measure was adopted in the belief that it was essential to keep the editorial voices of both newspapers in the many communities which had JOAs loud, clear and active. At the same time, the statute marked a major departure from antitrust law principles, and many members of Congress, even for the benefit of those newspapers, could not bring themselves to make such an exception. The legislation was, in short, hard fought. Senator Hart of Michigan led the opposition, but many others were involved.

The result was a compromise. This Congress carefully limited the exemption to publications "produced on newsprint paper" and to those "in which a substantial portion of the content is devoted to the dissemination of news and editorial opinion"; see 15 U.S.C. § 1802(4).

This careful definition was no accident. It was expressly adopted to exclude from the Sherman Act exemption the publication of "shoppers" and "advertising circulars." This bill would reverse the limitation which this Congress so carefully made only 17 years ago.

The talk of new technologies and new products raised today assumes a non-existent ignorance on the part of this Congress 17 years ago. These exact items which are the subject of discussion today were expressly considered there. The exact passage in the legislative history, Senate Report No. 91-535, Congress, First Session, November 18, 1969, on S.1520, which is the NPA, categorically declares that the definition was drawn "to exclude magazines and other 'slick paper' publications as well as free circulation 'shopping newspapers' and advertising circulars." This was expressly called to the attention of the Senate by Senator Fong, a sponsor of the bill, January 19, 1970 Cong. Rec. 1788, who quoted to the Senate the passage from that Act which would "exclude" from the exemption "'shopping newspapers' and advertising circulars."

What the Senate report then said would not be exempt, this bill would make exempt. What Senator Fong said was "excluded," this bill would include.

By coincidence, the same Tucson newspapers which had been the subject of the case in the United States Supreme Court later tried to distribute free shoppers, claiming the privilege of doing so under this statute. The United States District Court in Tucson, in the light of this absolutely clear legislative history, held that this was illegal under the original United States Supreme Court decision. It is that District Court decision which, by name, this bill seeks to overturn. I attach that opinion and commend it to the consideration of the Judiciary Committee as a clear and comprehensive statement of the law of this subject.

As a principle sponsor of this measure, Senator Hatch has placed his own statement on the bill into the Congressional Record. Senator Hatch, in his statement, says that Congress in 1970 "did not draft the legislation with them specifically in

mind." The "them" referred to is certain technical advances in the industry. The Congress certainly drafted the legislation with shoppers and slick paper publications in mind, because, as has just been demonstrated, they spoke about them expressly.

The statement speaks of the District Court decision in Tucson as unduly restrictive; we respectfully submit that no other interpretation is available than the one given there. It is true that the construction "effectively chills some JOAs in their commercial endeavors." It should. This Congress never meant to give JOAs the opportunity of wiping out suburban newspapers by combining in restraint of trade, and that is exactly what this bill would do. The statement wants to permit "slick paper"; it will be recalled that Senator Fong specifically decried such usage where free advertising was the object.

I respectfully submit that this Congress, when it made its meditated judgment to exclude shoppers from the antitrust exemption in the NPA, was right. The exemption is broad enough to keep the JOAs alive and well; indeed, their number has expanded since the Act was passed. The practical effect of the legislation is to crush the neighborhood editorial voices of the suburban papers, and this is wholly incompatible with the object of the bill in the first place.

We respectfully ask that this bill not pass.

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OF COUNSEL

OUR FILE NUMBER

WRITER'S DIRECT LINE

June 30, 1986

FEDERAL EXPRESS

United States Senate
Senate Committee on the
Judiciary
Washington, D.C. 20510

To Members of the Committee:

In this letter I am tendering my response to your written questions on S. 2314, as well as the responses of Jon Fishman.

You have asked me the following questions:

> In your opinion, does the pending bill merely follow-up in the spirit of the Newspaper Preservation Act (the NPA) or does it reverse several of the policy decisions of the NPA?
>
> Do you feel that the expansion of the antitrust exemption for newspapers in a Joint Operating Arrangement is warranted?

ANSWER:

The pending bill clearly reverses the policy decisions behind the NPA. The NPA's legislative history demonstrates that its purpose was to preserve separate editorial voices. To that end, it allowed newspapers to combine production, and advertising facilities, and to fix prices, so long as they retained separate editorial boards.

In contrast, S. 2314 has nothing to do with the newspaper's editorial voice. Instead, it allows newspaper with Joint Operating Agreements (JOAs) to send advertising material, such as shoppers to non-subscribers. The end result will be that the JOAs will be able to offer total marketing coverage to advertisers for areas surrounding the JOA, and those advertisers naturally will place their accounts with the JOA. This means that the advertising revenue for the small independent newspapers in the communities surrounding the JOA will dry up and those editorial voices will be silenced. This result conflicts squarely with the intent behind the NPA.

I have seen nothing to justify an expansion of the antitrust exemption for JOAs. We have been presented with no evidence that any JOA is failing financially. To the contrary, all available data suggests that JOAs have profit rates

significantly higher than independently owned newspapers. To allow the JOA to exploit their antitrust exemption even further into the relm of pure advertising would be unfair and unwise.

You have asked Mr. Fishman the following questions:

QUESTION: What was the practical effect of the recent Arizona district court decision by Judge Browning on suburban, small newspapers in Arizona?

RESPONSE: It prevented Tucson Newspapers, Inc., JOA for the Arizona Daily Star and Tucson Citizen, from stealing our slickpaper preprint insert accounts such as K-Mart, Safeway, Thrifty Drug etc.

In addition, it stopped Tucson Newspapers, Inc. from taking away our regular ads, especially from chains that have locations in both large cities and small communities, such as banks, grocery stores, discount stores, department stores, etc.

If S. 2314 were to pass, large JOAs could mail free shoppers containing slick preprint advertising inserts and regular ads to all homes in all surrounding communities covering a large outlying area around them, thus causing small community newspapers to go out of business.

JOAS would have an enormous monopoly advantage. They could offer advertisers a single source, a single rate and a single shipping point for inserts and ads, thus crushing small newspapers around them.

QUESTION: Is there a concentration of ownership of newspapers as a result of JOAs? (yes).

RESPONSE: Gannett, which owns 121 newspapers (93 dailies and 28 non-dailies) and is involved in five JOAs (not considering Detroit which has not yet been approved as a JOA) is a good example.

Another example is Scripps-Howard, which owns 56 newspapers (14 dailies and 42 non-dailies) and is involved in 8 JOAs.

QUESTION: Does this cause a legal monopoly in the print news media?

RESPONSE: Yes. When the two largest papers form a JOA in any city, they end up with most of the major advertisers and other print media must fight for what is left over.

QUESTION: Could most JOAs operate independently - or would they fail.

RESPONSE: Yes. Most JOAs could operate independently if they were properly managed and served their community with local news in addition to national news.

QUESTION: What is the profit rate of JOA newspapers?

RESPONSE: One example is Tucson Newspapers, Inc., the Tucson JOA, which showed a net profit of approximately 50% before the Arizona Daily Star and Tucson Citizen deducted their newsroom expenses, which were approximately 10%.

QUESTION: What is the profit rate for non-JOA newspapers?

RESPONSE: Approximately 12 1/2% according to Inland Daily Press Association.

QUESTION: What is it like to compete against a JOA?

RESPONSE: It is like trying to compete against a public utility.

Two important points to note (according to American Newspaper Publishers Association) are that group ownership of daily newspapers increased by 17% during 1985 and that group-owned daily newspapers accounted for 77% of the nation's daily newspaper circulation during 1985.

In closing, S. 2314 will only serve to lessen the total number of newspapers while permitting a few large groups to control the nation's press.

I hope these answers address your concerns.

Yours very truly,

Janet Napolitano

Senator HATCH. Mr. Picard, let us now turn to you.

STATEMENT OF ROBERT G. PICARD

Mr. PICARD. Mr. Chairman, I appreciate the opportunity to address you here. I have a different perspective from some of those people sitting at the table here with me now and some of those that were speaking to you earlier, in that I am not associated with any particular group involved in newspaper operations, but approach this as an economic scholar in the area of newspapers.

For the past 3 years, I have served as project director of the Press Concentration and Monopoly Research Project, which has attempted to cut through much of the rhetoric and get to the reality of what is happening in newspaper markets in the United States. I would like to address some of the concerns that we have about the newspaper industry and cut through some of the rhetoric that has surrounded this particular discussion.

First of all, I would point out that not all the changes in this bill are minor or technical, although some are. Some of them will significantly alter the structure of newspaper markets.

The changes proposed are also not necessary for the economic survival of any of the joint operating agreement papers that are of concern. In fact, most of the joint-operating agreement papers are owned by the largest newspaper firms in the country, including Gannett, Knight-Ridder, Newhouse, and Hearst.

We have some concerns that some of the changes in this bill will introduce into some markets difficulties for the suburban papers and weeklies that are competing in those areas. To give you an idea of the issue at the heart of this discussion, I want to drop into an economic discussion for a few moments to talk about the problems of newspaper morality and to talk about the problem of market power in any given market.

I brought a chart with me which goes back to Econ. 1, as you are all acquainted with, on the problem of market power. The chart shows a continuum extending from perfect competition to monopoly. All of the daily newspaper industry in this country is on the monopoly end of the spectrum, between oligopoly and monopoly.

There are a few situations in which you have three or two newspapers in competition. Such competition is declining greatly. You have the joint operating papers, joint monopoly papers—two papers operated and owned by the same company and firm—and finally you have the single newspaper which is as close to a perfect monopoly as is possible.

We want to talk about joint-operating agreements because what is being proposed here will put many of the potential competitors and substitutable products in the market out of the market, leading joint-operating agreement papers closer to a position of perfect monopoly.

In terms of newspaper mortality, we have to look at the numbers in a very broad context, otherwise you get a very misleading picture of what is happening in terms of the number of competing papers and the amount of newspaper mortality in the United States. You have to recognize that the failed newspapers in many of the metro areas of the country have been replaced with suburban dailies and weekly papers in what is now called umbrella competition. The result has, in fact, been a greater diversity in terms of information and advertising availability than had existed before.

In fact, many of the larger markets now support as many as a half dozen or more dailies under umbrella competition and as many as 200 weeklies in this kind of competition.

If you look at the newspaper mortality in the United States since the Second World War, you will find that the aggregate mortality is zero, that the number of daily newspapers has remained relatively the same. There have been deaths, to be sure, but they have been replaced by suburban dailies operating under umbrella competition. The large metro papers have been the ones who have been in trouble.

Joint operating agreement papers, which we are talking about now, are unlike any of the other newspaper operations that exist in the country because they are in fact government-licensed monopolies permitted to operate as no other newspapers are. They can engage in market and profit allocation, in price fixing, and other activities expressly prohibited by antitrust law.

The last thing these papers really wish to do is to compete as other papers do, to lose, for instance, the protection of the joint operating agreement.

Before I discuss briefly the effects of this bill, I want to point out the major problem that I have with this particular bill and then move to my suggestions for solutions to it.

The problem I see with this bill is that the sizes and the characteristics of markets in joint operating agreement situations vary widely. The Journal-Gazette and News-Sentinel in Fort Wayne, IN, are very different from the Journal and Times in Shreveport, LA, or from the market of the Examiner and Chronicle in San Francisco, or the Advertiser and Star-Bulletin in Hawaii.

Although the sizes and characteristics of these markets differ, and the amounts of inter- and intra-media competition differ this bill treats each market as if it were the same. Treating all of the markets as being the same under this bill will permit significant restrictions on competition in both advertising and information

markets in some of the locations, and this will, in fact, harm businesses and citizens and reduce diversity in some markets.

I want to give you an idea of what this bill will do in some of those markets. It will create in some markets situations that place significant disadvantages on businesses when they wish to purchase some advertising or to distribute slicks, or preprinted advertising material. It will permit the papers in joint operating agreements the opportunity to achieve monopoly because they will have not only the daily newspapers at their beck and call, but they will have total market coverage newspapers, which is the only truly cost-effective and closely substitutable product for daily newspaper advertising that many product and service firms can use.

Second, it will create situations in which consumers will be disadvantaged. If you wish to place a classified advertisement to sell your automobile, for instance, you can go to the daily newspaper. If you do not go to the daily newspaper today, your only alternative will simply be total market coverage newspapers—which are cheaper—or some other specialty publications that may exist.

If there is a video-based system in operation, you could also put your classified ad on that system. However, if the joint operating agreement papers own the video-based advertising delivery system and the total market newspaper system, you have an effective control on the market that will keep out competitors and allow prices to be raised significantly in all the media.

Also, if you permit the total market coverage papers to become a part of the joint operating agreement itself, it will create unusual economies of scale in the production of those TMC papers or in the possible distribution of slicks. As a result, no other competing paper will be able to provide the kind of advertising rates that exist there and they will be hurt competitively.

I think one of the worst parts of this bill is the fact that it will permit the creation of some situations in which insurmountable barriers to entry of any other alternative vehicle for printed news and advertising are erected in some markets.

These are the problems that I readily see with the bill and for which I am prepared to offer remedies.

The first suggestion is to kill the bill. That not being the case, I would propose some amendments to the bill that would not hurt joint operating agreement papers that wish to engage in some of these operations where monopoly is not as significant a problem.

My first suggested amendment is to provide a provision in the bill that prohibits any combination pricing of advertising with the papers in joint operating agreements and the total market papers or video-based advertising systems they may operate.

Admittedly, not all combination pricing is predatory, but this will certainly keep out the possibility that would happen.

I also think that there needs to be a provision added to this bill that will prohibit the operation of total market coverage papers as part of the joint venture in itself, but that might allow them to operate as completely separate subsidiary operations unprotected by section 3 of the act.

Fourth, I think it would be best to provide some mechanism of consent and overview in these situations, and I think that perhaps the Office of the Attorney General is the place to provide that, to

consider whether or not the operation of TMC papers or video-based advertising and information delivery systems would in effect monopolize a local market. If it does not, then consent could be granted.

Finally, I think that in the interest of trying to preserve some diversity in ownership, there should be a provision added saying that TMC and video operations could only be permitted to independently owned and operated newspapers in joint operating agreements and not to papers owned or operated by large newspapers groups.

Thank you.

[The prepared statement of Mr. Picard follows:]

Statement of Robert G. Picard, Ph.D.,
Before the U.S. Senate Judiciary Committee,
June 10, 1986,
About S.2314

Mr. Chairman and members of the committee, my name is Robert G. Picard and I am pleased to have this opportunity to address you. As project director of the Press Concentration and Monopoly Research Project of the Association for Education in Journalism and Mass Communication and a faculty member at the Manship School of Journalism at Louisiana State University, I have explored and considered the economic, social, and political causes and consequences of concentration and monopoly in the daily newspaper industry.

I want to share some observations about the impact of joint operating agreements on their newspaper markets and indicate the damaging effect that the legislation you are considering will have on some joint operating newspaper markets if it is passed in its current form.

The Newspaper Preservation Act of 1970 has had little impact on the daily newspaper industry as a whole. Its major effect was to legalize nearly two dozen joint operations that existed prior to its passage. Since that time less than a half dozen applications have been made to create new new joint operations.

The Newspaper Preservation Act is a special-interest provision that affects about two percent of the nation's daily newspapers and about eight percent of total daily newspaper circulation. Its stated aim is to maintain editorial diversity that would not otherwise be possible if joint operations were to fall under antitrust statutes.

In terms of market power, all daily newspapers operate as near monopolies. If one considers the market power continuum from perfect competition to monopoly, one quickly sees that daily newspapers are located at the monopoly end of the continuum. This occurs because newspaper markets are fixed in contiguous geographic areas by retail advertising and local news demands. Economic considerations involving the interplay between these demands make it difficult for multiple, closely substitutable daily newspapers to survive in a single market without one ultimately dominating and driving competitors out of the market.

Joint operating agreements were contrived as a means of keeping two newspapers in a single market by cooperating in production, advertising, and administration in such a way that significant economies of scale are achieved and competitive forces that keep advertising prices low can be removed and both papers reap the benefits of the increased profits.

The Newspaper Preservation Act exempted such arrangments from antitrust laws that prohibit the practices of price fixing, profit pooling, and market allocation and the creation of monopoly market power that such joint operations enjoy.

You are now being asked to extend the communication activities in which these operations may engage, thus permitting the operation of total market coverage papers, neighborhood and special interest papers, and video-based information systems.

The amendments proposed to the Newspaper Preservation Act in S. 2314 may at first glance appear to be minor technical changes, but they are not so simple and will significantly alter the structures of some of the newspaper markets involved.

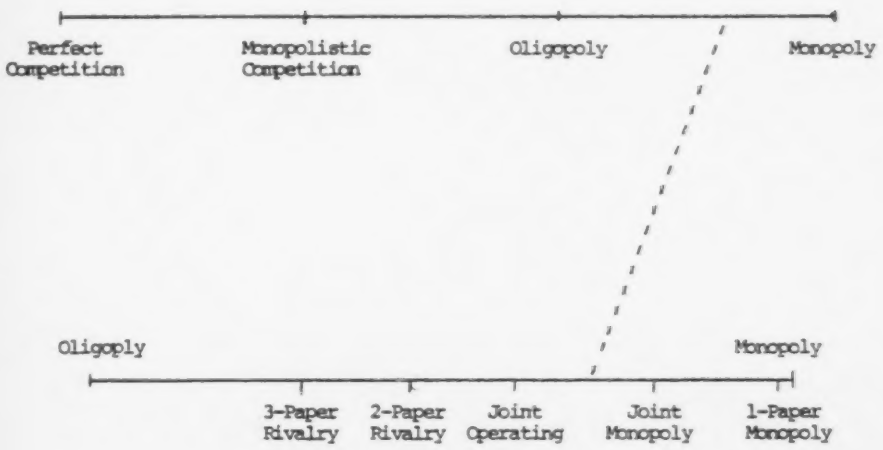
The amendments to the Act are not being made at a time when joint operating agreements are suffering financially at the hands of uncontrolled monolithic competitors. In fact, their return continues to exceed that of the manufacturing sector of the economy. If this proposed bill is rejected, the economic survival of the papers will not be endangered.

Before I discuss some of the effects that the bill will have on the markets in which joint operating papers exist, I need to point out that the sizes and characteristics of the markets vary widely.

The joint operation of the Journal Gazette and News Sentinel in Fort Wayne, Indiana exists in a significantly different market than that in which the Journal and Times in Shreveport, Louisiana, operate as a joint venture. And both markets bear little resemblance to that of the Examiner and Chronicle in San Francisco, California, or the Advertiser and Star-Bulletin, which dominate the entire state of Hawaii.

Although the size and characteristics of each market differs, and inter- and intra-media competition differs, this bill treats each market the same. Treating all the markets alike will permit significant restrictions on competition in the advertising and information markets in some locations that will harm businesses and citizens.

MARKET POWER CONTINUUM



In economic terms, the newspaper industry is unusual because it produces one tangible product, but it participates in two separate product/services markets. And its performance in the separate markets affects it performance in each.

The tangible product of the newspaper industry is, of course, information that is packaged and delivered in the form of the printed newspaper. This product is marketed to media consumers. The second market in which newspapers are involved is advertising. While some observers may casually conclude that papers sell space to advertising purchasers, a more precise and descriptive explanation is that the newspapers sell readers to advertisers. The industry delivers readers to advertisers, and the amount charged is more dependent upon the sizes and characteristics of audiences than the sizes of the advertisements themselves.

The demand for the product and service in the two markets differ and competition differs widely depending upon the availability of closely substitutable products and services.

The proposed amendments to the NPA will affect demand and competition in the JOA markets and provide papers with even more market power than they have now.

Reviews of the literature and original research about joint operating newspapers and their newspaper markets conducted during the three-year Press Concentration and Monopoly Research Project have revealed that the legalization of joint ventures has primarily benefited the publishers of

these papers and only marginally provided benefit to the public. In the area of pricing, consumers and advertisers are harmed by the average JOA.

Several studies have revealed that advertising prices are higher for joint operating agreement papers than for any other kinds of daily papers, including single newspaper monopolies. Evidence indicates that the papers are using their market power to increase prices without fear of new competition.

A number of studies have shown that profit engineering techniques have been employed to reduce circulation. This is done to achieve the optimal point on cost/revenue curves and to create a de facto price increase for advertising by reducing what the advertiser gets for his or her money. In most cases, circulation reductions are made in those geographic areas of the market where the demographics of the population are less desirable to large advertisers.

The great economies of scale created by the joint operations are not being passed on to the consumer, but retained by the publishers. There is no evidence that the economies are being used to hold down price increases in advertising rates.

Diversity of information is being only marginally maintained by joint operating agreements, according to a number of studies. Only slight differences exist between the two papers in most joint operations and there is rarely any significant product differentiation. Nevertheless, in terms of space allocation and expenditures for information, joint operating papers appear more like competitive papers than single newspaper monopoly papers.

If the bill before this committee is passed as currently proposed, five major problems can be expected to occur in some of the JOA markets.

First, the legislation will permit the creation of situations that significantly disadvantage businesses in the marketplace when they wish to purchase display advertising or distribute preprint advertising materials. It will permit JOA papers the opportunity to achieve monopoly in the newspaper advertising market by operating not only the daily newspapers but total market coverage and special interest papers, the only cost effective and closely substitutable product for daily newspaper advertising available to

many local businesses.

Second, the bill will permit the creation of situations that disadvantage consumers and businesses who wish to place classified and some display advertising by permitting JOA papers to operate video-based classified and display advertising systems. If a JOA operation controls video advertising systems, in addition to total market coverage papers, it will control all major advertising markets suited for classified and local retail advertising.

Third, the legislation will permit the operation of total market coverage papers as part of the joint operating agreement, creating unusual economies of scale that will not be available to competing total market coverage papers or community papers, thus making it nearly impossible for them to compete. In addition, it will permit the joint operating agreement papers to offer combination prices involving the dailies and the total market coverage papers that will be impossible for independent papers to match.

Fourth, the proposed amendments will permit creation of situations in which diversity of information is reduced--a direct contradiction of the purpose of the Newspaper Preservation Act. The bill will permit JOA papers to operate TMC and video information sources, the only effective substitutes for local news.

Fifth, the legislation will permit the creation of situations in which insurmountable barriers to entry of any alternative vehicle for printed news and advertising are erected.

I do not mean to sound alarmist or to overestimate the damage that this bill will cause. It will not have the same effects in each of the markets it will affect. But there are markets where the projected results of the bill will be felt.

These markets will experience increased costs of advertising, a reduction in the sources of local and national and international news, and reduced service areas for papers as profit engineering occurs.

This need not be the case and it need not require rejection of this bill, for there are markets where joint operating papers may be able to operate some additional media without monopolizing the market.

I would, however, like to point out that these joint operating papers have no <u>right</u> to operate these additional media or to operate as joint

publications. That right was given to them by the representatives of the people of the United States when the Newspaper Preservation Act was passed. There are no First Amendment issues involved here, only antitrust issues and public policy for the benefit of the citizens of the country.

Several amendments to this bill will make it possible for some joint operations to pursue the desired new distribution methods as adjuncts to their information and advertising delivery system now in existence.

First, a provision should be added to prohibit combination pricing of advertising with the daily papers in the joint operating agreements and the total market coverage papers and/or video-based advertising systems.

This will make it more difficult for a JOA operation to pursue pricing strategies designed to disadvantage competitors or potential competitors, or to drive them out of the market. Diversity and competition, after all, are the purposes of the Newspaper Preservation Act.

Second, the operation of video-based information and advertising systems and total market coverage papers should not be permitted as part of the "joint venture" as outlined in the Newspaper Preservation Act. It should be required to operate as a clearly separate subsidiary, unprotected against antitrust provisions by Sec. 3, except for its ownership, and subject to antitrust laws against any practices that would otherwise be unlawful under antitrust law.

Third, consent to operate any subsidiary paper or video-based system should be given by the Attorney General of the United States, whose office should provide consent in those situations where operation of the additional media does not effectively monopolize the local or national advertising markets for printed communication in the primary marketing area of the joint operating papers to the disadvantage of advertisers or media consumers.

This provision is needed because it is inappropriate to give consent to all JOA papers because of the potential dangers of such legally established monopolies, their contradiction with established antitrust principles, and the size differences in the characteristics of each market. Such a provision would protect the public interest without unduly restricting papers in markets where operation of additional media would not necessarily be harmful.

Fourth, the provisions permitting TMC and video-based operations should be applied only to independently owned and operated newspapers, not to papers owned and operated by newspaper groups.

This provision would help ensure independence and diversity and reduce economic concentration in the individual markets in which such newspaper groups own joint operating newspapers.

I believe these revisions will serve to ameliorate the dangers of more damage to competition and diversity that the Newspaper Preservation Act and the provisions of the existing bill pose. At the same time, they will permit newspapers in joint operating agreements to engage in the desired activities—total market coverage papers and video-based systems—when these activities are not injurious to the economic health of the community and do not permit an unreasonable monopolization of the market.

Thank you for permitting me to address you today. I hope my remarks and suggestions will be useful to you as you continue your deliberations.

Senator HATCH. Thank you.
Mr. Aginian, let us now take your testimony.

STATEMENT OF RICHARD D. AGINIAN

Mr. AGINIAN. Mr. Chairman, my name is Richard Aginian. I represent and am the immediate past president of Suburban Newspapers of America, the national trade association of America's grassroots press, suburban and community newspapers. SNA comprises more than 200 member companies publishing more than 1,800 newspapers, with more than 22 million circulation, weekly and semiweekly.

The industry employs more than 10,000 people and contributes nearly $1 billion to the American economy. The newspapers produced by our members must contain at least 25 percent news material, locally produced and edited, dealing very specifically with the local communities which we serve. We provide just the kind of independent editorial voice for the many small communities we serve, as is encouraged by the Newspaper Preservation Act, except the act excludes both daily, suburban, and community newspapers by ignoring them in the text. We exist under the umbrella of much larger metropolitan newspapers. We are mostly small companies rather than giant corporations. We do not benefit from nor do we seek special protection from the antitrust laws. We believe America was built on competition; we hope that competition is reasonably fair.

My testimony concerns S. 2314, a proposed amendment to the Newspaper Preservation Act. Passed in 1970, the act exempted from the antitrust provisions of the Sherman Act newspapers in probable danger of financial failure, allowing them to combine with their more successful competitors to form joint operating arrangements.

The public policy justification for allowing newspapers to pool their production, sales, circulation, and business operations was to preserve two separate and independent editorial voices where failure of a newspaper would leave only one.

The act itself defined very carefully just what was granted exemption from the Sherman Act:

> The term "newspaper publication" means a publication produced on newsprint paper which is published in one or more issues weekly (including as one publication any daily newspaper and any Sunday newspaper published by the same owner in the same city, community or metropolitan area), and in which a substantial portion of the content is devoted to the dissemination of news and editorial opinion.

Congress explicitly intended the Newspaper Preservation Act to exclude from protection from antitrust such things as shoppers and advertising circulars. The exact passage in the legislative history states that the definition was drawn "to exclude magazines and other 'slick paper' publications as well as free circulation 'shopping newspapers' and advertising circulars."

This exclusion is no accident. The Congress clearly intended to make a narrow exemption to the Sherman Act for the purpose of, in the words of the act, "maintaining a newspaper press editorially and reportorially independent and competitive in all parts of the United States." Congress did not pass the Newspaper Preservation Act in order to allow monopoly joint operating agreements to fur-

ther profit from selling and distributing advertising shoppers with no editorial content.

The sponsors describe this bill as a "technical amendment" merely to clarify the intent of the original law. It seems to me that the intent of the Congress is quite clear and in little need of clarification.

But if there are ambiguities in the law's application, why should Congress resolve them in favor of large, combined monopoly operations which already have the benefit of antitrust exemption? Smaller competitors do publish advertising circulation, shoppers, and free circulation newspapers. They do so, in part, because these are devices available to them by which to compete with much larger monopoly newspapers already benefiting from antitrust protection.

It is hard to imagine economic peril to JOA operators if the proposed amendment fails. But if the amendment passes, it is very easy to imagine JOA operations using this added monopoly tool to attack suburban newspapers and thereby silence the editorial voices of small communities not large enough or powerful enough to achieve antitrust exemption for their own.

It would be a perverse and sorry result if the Newspaper Preservation Act, legislation designed to preserve separate and independent editorial voices, would be used to silence just such voices.

At SNA's board of directors meeting, on June 4, 1986, the following statement of position was unanimously adopted:

> The Newspaper Preservation Act is history, and whether it was good or bad public policy is not today's issue. However, it did not consider the editorial voice of the suburban newspaper industry. Broadening the powers of a business combine which already enjoys antitrust exemption is the issue. The argument that JOA's are somehow "locked up" by the present Act is imaginary. The argument that they fear legal threats lacks foundation. The amendment is unnecessary and is bad public policy. The end result of this bill would be to silence the editorial voice of the suburban newspaper industry.

Let me close by adding a personal note to this testimony. I am the president of a suburban newspaper company doing business in the suburbs around Detroit, MI, where the largest JOA in the history of American journalism is now under scrutiny at the Department of Justice. Some industry observers have questioned whether the newspaper designated as the "failing" member of the JOA is in fact facing probable economic failure as the law provides.

They have asked if this might create a precedent to open the door for other JOA's around the country. It is for this reason that I am supporting public hearings on the Detroit application.

Frankly, I find the timing of these two events, first the introduction of an amendment to the Newspaper Preservation Act and, second, the attempt to create the largest monopoly JOA in the history of the country, more than purely coincidental. It is perhaps for this reason that JOA operators themselves are at odds about this proposed amendment, some favoring it and some opposing it.

Thank you.

[Prepared statement follows:]

SCC

SUBURBAN COMMUNICATIONS CORPORATION

36251 Schoolcraft Road, Livonia, Michigan 48150, (313) 591-2300

June 25, 1986

Hon. Orrin G. Hatch
Chairman
Subcommittee on the Constitution
United States Senate Committee on the Judiciary
Washington, D. C. 20501

Dear Senator Hatch:

This letter is in response to yours of June 19 in which you raise certain questions regarding S. 2314, the proposed amendment to the Newspaper Preservation Act.

1) Are JOA's really being used to save failing newspapers?

In some cases, maybe yes. In some cases, maybe no. In some markets based on my limited knowledge it is clear that without a JOA, one newspaper would fail, thereby depriving the public of a diversity of editorial voices. In other markets (including Detroit, where an application for a JOA between the Detroit Free Press and Detroit News is pending) it is not at all clear that one of the participants is in fact a failing newspaper within the meaning of the Act. The relief offered by the Newspaper Preservation Act can provide a rationalization for newspapers which do not wish to experience the rigors of true competition to achieve the relaxation and profitability afforded by monopoly status. This is the danger which accompanies any government intrusion into the workings of the market.

2) Is there a concentration of ownership of newspapers as a result of JOA's? Does this cause a legal monopoly in the print news media?

Yes, to both questions. It is clear that concentration of ownership in both print and electronic media is increasing, regardless of JOA's. But when you add JOA's to the equation, you achieve more rapid concentration than would otherwise be the case. A careful look at the companies which now participate in JOA's shows that the majority are large media companies with extensive and concentrated holdings in both print and electronic; these companies are growing and to achieve a stake in a JOA merely gives them an additional share in a legally authorized monopoly. Where JOA's have been allowed, the net effect is to legally authorize a monopoly in print media.

3) Could most JOA's operate independently or would they fail?

That depends on the market and on individual cases. In some cases, there is no doubt that absent a JOA, one newspaper would fail. In other cases, effective management could sustain independently owned yet profitable competitors without recourse to an exemption from anti trust laws.

4) What is the profit rate of JOA newspapers? What is the profit rate for non-JOA newspapers?

Absent a full study, it is hard to answer these questions definatively. It seems clear that JOA newspapers in virtually all cases operate at higher profit rates than non-JOA newspapers, if only because operations are inherently more profitable than competition. For JOA newspapers, 25%-35% profit rate seems not out of line. For non-JOA newspapers, there is a range of ordinary profits; smaller daily newspapers can operate at profit rates of 12% to 20% without being out of line.

5) What is it like to compete against a JOA?

It's tough. Smaller newspapers such as ours find themselves facing a much larger and richer organization. JOA's can develop joint rate cards by which advertising in both papers can be discounted, thereby moving it out of community papers. (Remember that it is extremely difficult in practice to prove predatory pricing in the newspaper business.) JOA's can share efficiencies of merged production, sales circulation and business facilities in ways not available to smaller newspapers. (Notice that smaller community newspapers are still governed by anti trust laws, so their attempts to combine forces or sell advertising jointly must pass muster in ways the JOA's do not.)

This point goes to the heart of the problem with the Newspaper Preservation Act. In seeking the public policy goal of diverse editorial voices, the Act literally ignored the smaller, community and suburban newspapers. In providing an exemption to anti trust laws for larger, daily newspapers, the Act runs the risk of putting out of business a group of smaller weekly newspapers. In seeking to save two big daily editorial voices, the Act puts at risk many more smaller weekly editorial voices. In allowing exemption from anti trust to only one sector of the print industry, the Act unfairly tilts against other sectors of the print industry. It's not a level playing field.

SUBURBAN COMMUNICATIONS CORPORATION

Competition to be effective must be fair. Either anti trust exemptions should be available to all parts of the print media or to none.

Sincerely,

Richard D. Aginian
President

Senator HATCH. Thank you, Mr. Aginian.

Let me ask a couple of questions. How many daily newspapers do Wick publish?

Mr. FRANK. Senator, would you mind asking it just a little louder?

Senator HATCH. How many daily newspapers does Wick publish?

Mr. FRANK. Dailies?

Senator HATCH. Yes.

Mr. FRANK. I will have to ask Mr. Wick. He has about 30 papers.

Mr. WICK. We have 9 dailies, small-town dailies, the largest circulation being about 16,000——

Senator HATCH. Fine.

Mr. WICK [continuing]. And then we have about 16 weeklies.

Senator HATCH. How many of these have zone editions or have total market offering?

Mr. WICK. Well, most of them we try to have—in fact, this is an interesting point, our newspaper where I live, in Sierra Vista, AZ, has a total market coverage and most of them do have some form of——

Senator HATCH. Do most of them have total market coverage?

Mr. WICK. But we deliver the full newspaper where we are, which is an interesting facet that is often used, whereas these people said that they could not do it. We do it and it is done by many newspapers and very successfully.

Senator HATCH. You have total market coverage in each of them. How about zone coverage?

Mr. WICK. We are not large enough to zone in the sense of breaking down the different areas.

Mr. FRANK. May I clarify, because in the *Tucson* case Mr. Fishman is the publisher for Mr. Wick of that paper there, he has total market coverage in the genuine way that it ought to exist, that is, they just have subscribers of 94 percent of the people of the community. I trust the record is being made clear, as Mr. Wick has said, that where they get total market coverage they do it in a way which Judge Browning would fully have permitted and which we never objected to. They distribute the whole newspaper. Where this war arises is in the distribution simply of shoppers without a newspaper.

Senator HATCH. If a JOA cannot lawfully engage in business activities such as total market coverage, how can the JOA compete on equal terms in the marketplace?

Mr. FRANK. Your Honor, this——

Senator HATCH. Are you saying because they are delivering the total newspaper that it is distinguished from what the JOA's would like to do?

Mr. FRANK. The answer, Senator, is that this Congress has seen fit to permit the JOA's to compete by price fixing, tying, and other acts which they do in truth which are the result of having an exemption from the Sherman Act. They do not have to compete in the prices for the advertising, they can tie, make sure if you go with one you go with the other, and, finally, because it eliminates competition economically between the papers, it permits them to lower the quality of the papers and drain dollars out, and quite vividly this happens in some parts of the country and we could give

you chapter and verse if you wish to enlarge the record to that extent.

Senator HATCH. It would be good if you would submit that for the record.

Mr. FRANK. Well, may I pick the point up in a brief way, would you permit that?

Senator HATCH. If what?

Mr. FRANK. May I pick that point up for just a moment, if you are interested?

Senator HATCH. Yes.

Mr. FRANK. Let me ask Ms. Napolitano, my partner, to give us the experience of what has happened in Tucson, for example, with the Citizen protected by a JOA on its editorial functions.

Ms. NAPOLITANO. Well, one concrete result has been that the editorial staff of the Citizen has been reduced from over 100 to just over 60, for the same circulation, so they are saving costs on the editorial side of the paper by virtue of the JOA.

Mr. PICARD. Mr. Chairman, in the larger JOA markets, you are dealing with papers that range in circulation from a quarter of a million to nearly half a million, and they are competing against daily newspapers in the suburban areas that operate in the midsize range that may be anywhere from 10,000 to 50,000 circulation. There is no great disparity in the size or the market power of those small suburban papers or medium size suburban papers yet the JOA papers have huge market power by comparison.

Even where TMC's are operated in small areas by these smaller papers, they do not operate a total TMC that would cover the entire metro area but, rather, just the area in which they normally compete, so you are not talking about small, suburban papers being a monolith against an unprotected JOA newspaper operation.

In fact, if you look at the return on joint operating papers, you will find they are about double the return of what is happening in nonjoint operating papers, so it is hard for me to put a lot of credence in the claim of poverty on behalf of all JOA papers. There are some markets where there are indeed problems.

Senator HATCH. As I listen to your testimony, it seems that basically many of the concerns that you are raising deal with the heart of the actual 1970 act. Would it not be a fair interpretation to say that you would just as soon get rid of the 1970 act which allows newspapers to enter into joint operating agreements with respect to their noneditorial functions?

Mr FRANK. Well, on that score—and I would be grateful if you would let me pick up two last points, and then I know you must go—on that point, No. 1, we sympathize. Mr. Aginian, for example, is about to be exposed to a JOA where I really do not think it is within the scope of the act, but for the most part we simply do not regard that as today's war. That was taken up 16 years ago. My Senator, Senator Hayden, helped materially in putting it through and I nurture the view that what Senator Hayden wanted I wanted, so I do not want to argue about it now.

I would like, however, if you will permit it, a very brief inclusion in the record which may be read sometime, Mr. Fishman is the active publisher of the immediate newspaper involved in the litigation in Arizona and if you would permit me to let him make a brief

comment on the impact of all this on his area and his newspaper, we would like that. May I do that?

Senator HATCH. Yes.

STATEMENT OF JON FISHMAN

Mr. FISHMAN. Thank you, Senator. Green Valley is a totally and completely separate community, not connected to Tucson. In fact, we are separated by an Indian reservation. We have many of the same major advertisers that also advertise with Tucson newspapers, yet Tucson newspapers approach the same advertisers saying that they could deliver all of Green Valley with their total market coverage shopper which is sent through the mail, thus eliminating the need for the use of Green Valley, of the Green Valley News.

If they had been allowed to do this, if we had not gone to court, they would have taken our major advertisers and they would have put us out of business. This is a situation where they came into the community that is not even a part of Tucson and just attempted to take our major advertisers away with their total market coverage.

Senator HATCH. We appreciate that.

At this point in the record I would like to include an article from the 1984 Brigham Young University Law Review, which is entitled, "Judicial Application of the Newspaper Preservation Act: Will Congressional Intent be Relegated to the Back Pages?"

In this particular article the authors conclude that:

> Although the NPA has generally been as effective as Congress intended it to be, the electronic and telecommunication revolution of the 1980's is going to place new stresses on the struggling newspaper industry. These difficulties can be overcome only if the courts and Antitrust Division accept the resolution of the competing interests of antitrust enforcement and newspaper preservation already made by Congress.

In addition we will put a Newspaper Research Journal article in the record by Walter E. Niebauer, Jr., entitled, "Effects of the Newspaper Preservation Act on the Suburban Press."

[The articles referred to follow:]

BRIGHAM YOUNG UNIVERSITY LAW REVIEW

JUDICIAL APPLICATION OF THE NEWSPAPER PRESERVATION ACT: WILL CONGRESSIONAL INTENT BE RELEGATED TO THE BACK PAGES?
John S. Martel
Victor J. Haydel III

STATE TAXATION OF INTERSTATE COMMERCE UNDER PUBLIC LAW 86-272: "A RIDDLE WRAPPED IN AN ENIGMA INSIDE A MYSTERY"
Timothy J. Sweeney

J. REUBEN CLARK LAW SCHOOL

VOLUME 1984 NUMBER 2

Judicial Application of the Newspaper Preservation Act: Will Congressional Intent Be Relegated to the Back Pages?

*John S. Martel**
*Victor J. Haydel III***

Hailed as a "charter of freedom" conceived with a "generality and adaptability comparable to that found to be desirable in constitutional provisions,"[1] the Sherman Act[2] has justifiably been treated by the federal courts as a mandate to develop an "antitrust law" in the manner of the common-law courts.[3] In following this mandate, however, courts have at times been inclined to forget that the antitrust statutes are, after all, only statutes and that Congress remains free to decide the extent to which competition is truly in the public interest[4] and to enact limitations on, and exemptions from, the antitrust laws it has created.[5]

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The authors are partners in the San Francisco law firm of Farella, Braun & Martel, which represented the defendants in the second *Pacific Sun* case in San Francisco, *see infra* notes 79-83, 93-97 and accompanying text, was engaged as special consultant in the *Honplulu* case, *see infra* notes 98-107 and accompanying text, and assisted on the briefs in the appeal of the Seattle *Independent Post-Intelligencer* case, *see infra* notes 120-66 and accompanying text. The authors gratefully acknowledge the assistance of Mark Petersen and Wallace Lightsey in the preparation of this article.

1. Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359-60 (1933).

2. 15 U.S.C. §§ 1-7 (1982).

3. *See* 1 P. Areeda & D. Turner, Antitrust Law ¶ 106 (1978).

4. *See id.* ¶ 202b.

5. *See, e.g.*, Hecht v. Pro-Football, Inc., 444 F.2d 931, 935 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972). *See generally* 16F J. von Kalinowski, Antitrust Laws and Trade Regulation § 44.01 (1983) (discussing statutory exemptions in the antitrust laws).

Exemptions may be either express or implied. In finding an implied exemption, the courts are fairly rigorous in requiring proof that Congress intended to exempt an industry from the antitrust laws, and the courts construe such implied exemptions quite narrowly. *See, e.g.*, Silver v. New York Stock Exch., 373 U.S. 341, 357 (1963) ("Repeal is to be regarded as implied only if necessary to make the [relevant act] work, and even then

One such congressionally created exemption is the Newspaper Preservation Act (NPA).[6] The NPA was enacted in 1970 with the express purpose of preserving editorial and reportorial diversity within the newspaper industry.[7] The NPA was passed in direct response to the Supreme Court's decision in *Citizen Publishing Co. v. United States*,[8] which had declared that a joint operating arrangement (JOA)[9] between two Tucson daily newspapers violated the Sherman Act. The NPA overruled *Citizen Publishing* by providing a limited exemption from antitrust liability to participants in existing JOAs (pre-Act JOAs) and by establishing standards and a procedure for proposed JOAs (post-Act JOAs) to qualify for antitrust exemption.[10] Thus, Congress tacitly blessed the twenty-two JOAs already in existence and cleared the path for future combinations, which would otherwise have been vulnerable to antitrust attack.

During the early and mid 1970s, the NPA succeeded in stabilizing the industry. Attacks on existing joint operating arrangements were rare and were settled without judicial interpretation of the standards set forth in the Act.[11] During this period the formation of three new JOAs was proposed, and two of the JOAs were approved without challenge. The third was contested at the administrative level, but the Attorney General's approval of that application was not tested in the courts.

In the late 1970s, however, the stability produced by the NPA was threatened. In 1979, the case of *Pacific Sun Publish-*

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only to the minimum extent necessary.").

6. Pub. L. No. 91-353, 84 Stat. 466 (1970) (codified at 15 U.S.C. §§ 1801-1804 (1982)).

7. 15 U.S.C. § 1801 states that the Act's purpose is "maintaining a newspaper press editorially and reportorially independent and competitive in all parts of the United States." *See also* S. REP. No. 535, 91st Cong., 1st Sess. 3 (1969), *reprinted in* S. OPPENHEIM & C. SHIELDS, NEWSPAPERS AND THE ANTITRUST LAWS § 58, at 215 (1981) (incorrectly cited as S. REP. No. 585) ("The committee believes that this bill is necessary to prevent communities with newspapers having editorial voices under separate corporate control from losing one of the established editorial voices.").

8. 394 U.S. 131 (1969).

9. A joint operating arrangement is a merger of the noneditorial and nonreportorial functions of the newspapers. "Typically, the two newspapers [are] published in the same plant, [use] the same distribution facilities, set advertising and circulation rates jointly, and [share] in the profits." S. OPPENHEIM & C. SHIELDS, *supra* note 7, at 187. For a description of one JOA, see findings 17-20 in United States v. Citizen Publishing Co., 280 F. Supp. 978, 980-81 (D. Ariz. 1968).

10. *See* 15 U.S.C. § 1803(a), (b) (1982); S. REP. No. 535, 91st Cong., 1st Sess. 3 (1969), *reprinted in* S. OPPENHEIM & C. SHIELDS, *supra* note 7, at 215.

11. The most notable of these was Bay Guardian Co. v. Chronicle Publishing Co., 344 F. Supp. 1155 (N.D. Cal. 1972).

ing Co. v. Chronicle Publishing Co.[12] required a San Francisco jury to decide the fate of a preexisting joint operating arrangement. After protracted litigation, the trial ended with a hung jury. In 1981, an extended retrial with a wholly different set of jury instructions produced a verdict in favor of the defendant newspapers.

In 1982, the case of *City of Honolulu v. Hawaii Newspaper Agency*[13] went to trial in the United States District Court for the District of Hawaii. The *Honolulu* court applied yet a different interpretation of the NPA standards, in its instructions to the jury, than had either of the *Pacific Sun* courts. The *Honolulu* litigation also resulted in a hung jury. In February 1983, the court granted the *Honolulu* defendants' motion for a judgment notwithstanding the verdict.[14] These two cases have been the only challenges to preexisting JOAs to reach the trial courts.

Two applications for approval of prospective JOAs under section 1803(b)[15] of the Act have been contested. In 1977, an administrative law judge considered the application of two Cincinnati newspapers. After a hearing in which the Antitrust Division opposed the JOA, the judge recommended approval,[16] and his recommendation was accepted by the Attorney General. More recently in *Committee for an Independent P-I v. Hearst Corp.*,[17] the Court of Appeals for the Ninth Circuit analyzed the NPA's test for future applications. In the course of affirming the Attorney General's approval of a joint operating arrangement between two Seattle newspapers, the Ninth Circuit became the first reviewing court to articulate standards to be applied in resolving challenges to proposed JOAs.

As this handful of cases began reaching the courts and administrative proceedings, observers hoped that the NPA's vague generalities would be clarified and that specific tests and consistent standards would evolve. All that the recent decisions make clear, however, is that barring congressional reconsideration, the NPA is here to stay.

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12. Civ. No. 75-1845 RPA (N.D. Cal. June 15, 1981).

13. 559 F. Supp. 1021 (D. Hawaii 1983).

14. Intervenors have been permitted to appeal the district court's decision. Their appeal will probably be reviewed by the Ninth Circuit.

15. 15 U.S.C. § 1803(b) (1982).

16. Application by The Cincinnati Enquirer, Inc., Dep't of Justice Docket No. 44-03-21-4, slip op. at 143 (May 1, 1979) (recommended decision of Donald R. Moore, A.L.J.).

17. 704 F.2d 467 (9th Cir.), *cert. denied*, 104 S. Ct. 239 (1983).

Although challenges to its constitutionality have been rejected by two different courts,[18] the Act's standards for qualification and its effect on the future of the industry seem even more uncertain now than they did in 1970. Each attempt to construe the Act has resulted in conflict with preceding constructions. The recent Ninth Circuit decision—which could have resolved these conflicts—has instead perpetuated uncertainty and undermined the NPA's stated objective.

This article argues that the Ninth Circuit missed a golden opportunity to provide stable guidelines to future JOA applicants, examines the NPA in the context of the conflicting judicial interpretations, and seeks to determine what those judicial interpretations might mean to future challenges to both existing and prospective JOAs.

I. The Background and Enactment of the NPA

Enforcement of the antitrust laws is premised on the assumption that promoting economic competition serves the public interest.[19] Thus, an exception to the antitrust laws may be justified when (1) economic competition is secondary to another even more important goal; or (2) competition is not in the public interest.[20] The NPA embodies a congressional determination that both bases for creating an exception exist in the newspaper industry.

reasons for antitrust exemptions

Newspapers operate in two arenas: the commercial marketplace and the marketplace of ideas.[21] In the marketplace of ideas, a newspaper provides to society numerous benefits that do not always translate directly into profits. In the commercial marketplace, economic pressures unique to the newspaper industry create a market structure in which competition is not necessarily a healthy condition. In fact, competition between two or more newspapers in metropolitan areas has usually resulted in driving financially weaker papers out of business,[22] leaving the public

18. *See Indep. P-I*, 704 F.2d at 467; Bay Guardian Co. v. Chronicle Publishing Co., 344 F. Supp. 1155 (N.D. Cal. 1972); *accord* Heheman v. Bell, 1978-1 Trade Cases ¶ 61,975 (S.D. Ohio 1978).

19. *See* P. Areeda & D. Turner, *supra* note 3, ¶ 103.

20. Comment, *The Newspaper Preservation Act*, 32 U. Pitt. L. Rev. 347, 349 (1971).

21. *See, e.g.*, S. Oppenheim & C. Shields, *supra* note 7, at iii, 1; Note, *Monopoly Newspapers: Troubles in Paradise*, 7 San Diego L. Rev. 268, 278 (1970).

22. Morton, *St. Louis Newspaper Blues*, Wash. Journalism Rev., Jan.-Feb. 1984, at 16 [hereinafter cited as Morton, *St. Louis*]; Morton, *Failures in the Fourth Estate*,

less well served, rather than providing incentives for the production of better goods.

Thus, in the newspaper industry, antitrust legislation designed to enhance competition in the commercial marketplace has threatened to stifle competition in the marketplace of ideas.[23] In enacting the NPA, Congress chose to preserve competition in the marketplace of ideas by allowing cooperation in commercial operations.[24]

free press importance

Newspapers occupy a unique position in American society. As Justice Stewart has observed, the guarantee of a free press is the only provision in the Bill of Rights that protects an institution rather than a type of individual liberty.[25] This institutional protection reflects a view of the free press as a quasi-governmental branch existing to scrutinize, to criticize, and thereby to check the three official branches.[26] Although Justice Stewart's remarks are applicable to the media in general,[27] the newspaper industry is a unique component of the media in several respects: (1) the daily newspaper provides a cluster of services in one twenty-five cent package,[28] (2) the newspaper reflects the local

? not institution, but liberty, that is protected

WASH. JOURNALISM REV., Dec. 1981, at 14.

23. Note, *Local Monopoly in the Daily Newspaper Industry*, 61 YALE L.J. 948, 1007 (1952) [hereinafter cited as Note, *Local Monopoly*]; *accord* Knox, *Antitrust Exemptions for Newspapers: An Economic Analysis*, 1971 LAW & SOC. ORD. 3, 17-18. A number of commentators have questioned the reality of this dilemma. *See* Lee, *Antitrust Enforcement, Freedom of the Press, and the "Open Market": The Supreme Court on the Structure and Conduct of Mass Media*, 32 VAND. L. REV. 1249, 1340-41 (1979); Roberts, *Antitrust Problems in the Newspaper Industry*, 82 HARV. L. REV. 319, 322-24 (1968); Note, *Newspaper Preservation Act: A Critique*, 46 IND. L.J. 392, 411-12 (1971) [hereinafter cited as Note, *Critique*]; Note, *The Newspaper Preservation Act: The Seattle Application*, 1982 U. ILL. L. REV. 669, 670 [hereinafter cited as Note, *Seattle Application*].

24. S. OPPENHEIM & C. SHELTIS, *supra* note 7, § 50; *see* Knox, *supra* note 23, at 17-18; Note, *supra* note 21, at 282-83. Enactment of the NPA has generated a storm of controversy over whether the Act is an effective means of achieving its goal of preserving editorial diversity. *See* Knox, *supra* note 23, at 20-21; Lee, *supra* note 23, at 1275; Note, *Critique*, *supra* note 23, at 399, 410; Comment, *Antitrust Malaise in the Newspaper Industry: The Chains Continue to Grow*, 8 ST. MARY'S L.J. 160, 167 n.57 (1976); Comment, *supra* note 20, at 358; Note, *supra* note 21, at 282-83; Note, *Failing Newspaper or Failing Journalism: The Public Versus the Publishers*, 4 U.S.F.L. REV. 465 (1970) [hereinafter cited as Note, *Failing Newspaper*].

25. Stewart, *"Or of the Press,"* 26 HASTINGS L.J. 631, 633 (1975).

26. *Id.* at 634.

27. *See* Nimmer, *Introduction — Is Freedom of the Press a Redundancy: What Does it Add to Freedom of Speech?*, 26 HASTINGS L.J. 639, 651 (1975) (pointing out similarities between media types).

28. One court has described this package as follows:

> [A daily newspaper] provides readers with a daily written record of current events and reference information including vital statistics, public announce-

community's needs and identity in more detail than other media,[29] and (3) the newspaper plays a dominant role in informing consumers and providing market information.[30] Furthermore, newspapers typically provide more editorial content than do the other media. Because of newspapers' vital role in a democratic society,[31] newspapers representing a diversity of viewpoints must be preserved.[32] Therefore, while the reallocation of resources caused by the business failure of an inefficient manufacturer is usually in the public interest,[33] allowing newspapers to fail may result in a net loss to society.[34]

A. The Demise of an Industry

Unfortunately, the metropolitan newspaper industry in America is in serious trouble. Its economic health has been deteriorating for half a century,[35] and its decline has been hastened in recent years by the advent of television and other changes in life-style inimical to this once dominant medium. In 1909, 609 American cities had competing daily newspapers. By 1968, that number had been reduced to forty-five. At present, only twenty-three cities in the entire United States have two or more com-

reduction in 2 newspaper cities

ments, legal notices, box scores, stock market reports, weather reports, theater listings and radio and television logs. They provide more, wider and deeper coverage of all news—international, national and local—than any other medium of daily news dissemination. They offer a combination of syndicated features, such as comics, columnists and cartoons, not carried by any other medium.

United States v. Times Mirror Co., 274 F. Supp. 606, 617 (C.D. Cal. 1967), *aff'd per curiam*, 390 U.S. 712 (1968).

29. *Id.*; S. OPPENHEIM & C. SHIELDS, *supra* note 7, § 3, at 3.

30. S. OPPENHEIM & C. SHIELDS, *supra* note 7, § 4, at 11 ("Advertising designed to appeal primarily to the consumer's desire to compare the prices, or specifications of a range of products, is better served by printed than by audible media.").

31. Comment, *supra* note 20, at 355; *see also* Note, *Local Monopoly*, *supra* note 23, at 951-52.

32. Celler, *The Concentration of Ownership and the Decline of Competition in News Media*, 8 ANTITRUST BULL. 175, 178-79 (1963); *see also* Note, *Local Monopoly*, *supra* note 23, at 955-57.

33. *See* Knox, *supra* note 23, at 18. In opposing enactment of the NPA, the Department of Justice argued that "a special antitrust exemption for newspapers would undermine the basic premise of our economic system; that is, the success of an enterprise should depend on the ability of its management to produce an acceptable product for its customers." S. REP. No. 535, 91st Cong., 1st Sess. 6 (1969), *reprinted in* S. OPPENHEIM & C. SHIELDS, *supra* note 7, § 5*8, at 217.

34. Note, *Seattle Application*, *supra* note 23, at 671 n.15.

35. *See* S. OPPENHEIM & C. SHIELDS, *supra* note 7, at 187.

peting newspapers.[36] Most recent victims include such large circulation dailies as the *Cleveland Press*, the *Philadelphia Bulletin*,[37] the *New York Daily News Tonight*,[38] the *Washington Star*,[39] and the *Buffalo Courier Express*.[40]

In the thirty largest markets, only four cities are supporting more than one profitable newspaper. Three of these cities are in Texas, and the newspapers in those cities may owe their success more to circumstances unique to the prosperity of Texas than to unusually efficient management policies.[41] In the fourth city, Chicago, two papers are still feeding on the failure of three other major newspapers in the past twelve years. A leading analyst has described the current situation in these terms: "In a town where there are two commercially separate newspapers, the second one is usually losing money."[42] As early as 1953, the Supreme Court described this phenomenon, stating in *Times-Picayune Co. v.*

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36. Telephone interview with John Morton, Washington, D.C. security analyst specializing in newspaper properties with the securities firm of Lynch, Jones, and Ryan (Nov. 5, 1984). The list of the remaining cities is interesting: Anchorage; Baltimore; Boston; Chicago; Colorado Springs; Dallas; Denver; Detroit; Green Bay; Hooksville, Tennessee; Houston; Kingsport, Tennessee; Laredo; Las Vegas; Little Rock; Los Angeles; New York; Sacramento; San Antonio; Scranton; Trenton; and York, Pennsylvania.

37. The *Philadelphia Bulletin* held on for a while by requesting and receiving an eleventh hour capitulation from eight unions that agreed to a package reduction amounting to $4.9 million per year. Even so, experts had forecast, and the *Philadelphia Bulletin* acknowledged, losses of $10.3 million in the first six months of 1981.

38. The *New York Daily News Tonight*'s actual performance fell dismally short of ambitious plans for achieving a circulation of 300,000 subscribers in head-to-head competition with the *New York Post*. The newspaper conceded defeat, having realized a circulation of only approximately 60,000 subscribers after expending the $20 million appropriated for the purpose by the Tribune Company, owner of the *Chicago Tribune* and other newspapers. Cuts involving scaling down of news and feature contents still left the well-managed and well-financed *Daily News* with losses in the neighborhood of $10 to $15 million in 1982. Various unions agreed to concessions and buyouts, which cost the Tribune Company $75 million and left the *Daily News* with a much reduced labor force. By the start of 1983 the newspaper was beginning to show a modest profit.

39. After total losses of $85 million (ranging between $16 and $20 million during the last two years of operation), Time, Inc. conceded defeat to the powerful *Washington Post* and suspended operations. Although rumors were rampant, no one stepped forward to take over the *Star*'s circulation and its equipment was purchased by the competing *Washington Post*, effectively eliminating any possibility of major competition in the future.

40. The *Buffalo Courier Express* closed September 19, 1982. The owner stated that the paper had lost an average of $8.6 million per year since he acquired it in 1979.

41. The three cities are Houston, Dallas, and San Antonio. The economy of Texas was seemingly immune from the recession that plagued most of the nation during the late 1970s and early 1980s, arguably accounting for the performance of the newspaper industry in these cities.

42. Gordon, *Ad Starvation Sinks 'Star,'* ADVERTISING AGE, July 27, 1981, at 1, 66 (quoting John Morton).

United States,[43] "[D]aily newspaper competition within individual cities has grown nearly extinct."[44]

reasons for dwindling papers:
① TV + radio
② suburbs

This discouraging situation is, in large part, a product of the unique market position of the daily metropolitan newspaper. During the past three decades, newspapers have been the target of an intensely competitive attack by television and by a resurgent radio industry.[45] The dwindling ranks of blue-collar workers, once the bulwark of the afternoon newspaper market, have abandoned the ritual afternoon paper in favor of the more easily digested television or radio news report. In addition, the flight to the suburbs has contributed to the problem by providing the catalyst for the creation of new, highly competitive suburban papers. Rapidly expanding "bedroom communities" have produced new schools, police departments, and local political personalities and issues—all the ingredients necessary to create a news matrix justifying a suburban newspaper. These outlying papers have cut away at the edges of the metropolitan daily's circulation and advertising.[46]

③ economic realities

The essence of the problem, however, lies in the "downward spiral," an economic phenomenon with a negative impact on both the cost side and the revenue side of the newspaper business. On the one hand, the newspaper industry is troubled by a cost side that is both labor and capital intensive. For this reason, expanding circulation is the only means for a locally independent daily to improve its efficiency.[47] On the revenue side, newspapers differ from industrial enterprises because a daily newspaper must depend on advertising revenues (rather than subscriptions) to cover total costs and to ensure a profit.[48] Advertisers naturally favor the newspaper with the greatest circulation. Thus, if a newspaper's circulation drops, advertising revenues will suffer. A reduction in revenues causes a decline in the quality of the newspaper, which in turn causes circulation to drop further.[49] Once this spiral begins, it is rarely reversed.[50]

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43. 345 U.S. 594 (1953).

44. *Id.* at 603.

45. *See* Reed, *Hard times force papers to merge—or purge*, ADVERTISING AGE, July 19, 1982, § 2, at M-32; *see also* B. OWEN, ECONOMICS AND FREEDOM OF EXPRESSION: MEDIA STRUCTURE AND THE FIRST AMENDMENT 48-52 (1975).

46. *See* Note, *supra* note 21, at 271.

47. *See* Note, *Local Monopoly*, *supra* note 23, at 976-77.

48. S. OPPENHEIM & C. SHIELDS, *supra* note 7, § 3, at 4.

49. *See, e.g.*, United States v. Citizen Publishing Co., 280 F. Supp. 978, 985 (D. Ariz. 1968), *aff'd*, 394 U.S. 131 (1969); Note, *supra* note 21, at 272-73; Note, *Seattle Applica-*

B. The Industry's Response

With its survival at stake, the newspaper industry responded in several ways. Some of the responses were of questionable legality, including (1) volume discounts, a tactic that did not always meet the vaguely stated criteria of the Robinson-Patman Act[51] and that was often alleged to constitute price discrimination;[52] (2) advertising price wars, in which sales below cost were attacked as predatory pricing;[53] (3) combination rates,[54] which have been held to constitute an illegal tying arrangement in violation of the Sherman Act;[55] and (4) cancella-

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tion, *supra* note 23, at 671-72; Note, *Failing Newspaper*, *supra* note 24, at 472-73.

50. Note, *supra* note 21, at 272-73; Note, *Failing Newspaper*, *supra* note 24, at 472-73; *see also* B. Owen, *supra* note 45, at 50-52, *reviewed by* Posner, Book Review, 86 YALE L.J. 567 (1977) ("cost and demand conditions severely limit the possibilities of competition within local newspaper markets").

51. 15 U.S.C. § 13 (1936). This section substantially rewrote and amended section 2 of the Clayton Act, 15 U.S.C. §§ 12-27 (1914).

52. Because media advertising has been classified as an intangible good not fitting within the "commodity" language of § 2(a) of the Robinson-Patman Act, that Act has traditionally been held not to apply to the sale of media advertising. *See, e.g.*, ALW, Inc. v. United Air Lines, 510 F.2d 52, 57 (9th Cir. 1974); Columbia Broadcasting Sys. v. Amana Refrigeration, Inc., 295 F.2d 375, 378 (7th Cir. 1961), *cert. denied*, 369 U.S. 812 (1962). The FTC attempted to revive an argument in favor of extending application of the Robinson-Patman Act in that manner. Times Mirror Co., 92 F.T.C. 230 (1978). However, the Commission ultimately rejected the argument. Times-Mirror Co., 100 F.T.C. 252 (1982).

53. The California Unfair Practices Act, CAL. BUS. & PROF. CODE § 17043 (West 1964), prohibits the sale of a product for a price below cost for the purpose of injuring a competitor or destroying competition. A newspaper owner's assertion that circulation and advertising revenues are not sufficient to meet expenses can easily be turned around by an adversary into an alleged admission that the sales price was below the cost of production. If prices were deliberately kept low because of competitive pressures, the adversary will undoubtedly attribute to the newspaper's management the objective of "injuring competition" and argue that the Unfair Practices Act has been violated. The difficulty of defending against this charge can, ironically, be turned on its attackers. Advertising and newspaper sales must be considered separate products because they are sold separately. Yet because of the unique interrelationship of advertising and circulation—all production expenses are properly chargeable to either or both—there is no rational basis upon which to allocate expenses between the two "products." (Is a costly delivery truck used for advertising or circulation?) The cost of each separate article or product is therefore beyond calculation, which makes the Act impossible to apply.

54. Combination rates are established by a newspaper with a morning and afternoon edition. They compel the advertiser to duplicate his advertisement in the weaker edition because of the small additional cost involved.

55. In Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953), the Supreme Court considered a Sherman Act § 1 claim alleging that the exclusively joint sale of advertising in commonly owned morning and afternoon newspapers constitutes an illegal tying arrangement. The Court held that, because the relative market share of a competing afternoon paper prevented a finding of market dominance in either the morn-

tion of independent distributorships, sometimes alleged to be an attempt to maintain resale prices.[56]

Some of the responses were clearly legitimate. Intensive promotions were, and still are, the most common of such responses. These typically have taken the form of two-for-one offers, giveaways, and other devices that bolster circulation reports but undercut the "true" circulation base.[57] A second response was reformation of the product, which is a form of de facto market segmentation. Product reformation succeeded in San Francisco in the mid-1950s when the *San Francisco Chronicle* redirected its focus to the hip, college-educated, suburban audience and displaced the *San Francisco Examiner* as the number one newspaper in town.[58] A third response was to change to a tabloid format. Newspaper owner Rupert Murdoch favors this approach, which is characterized by a shift to a simplified story approach with emphasis on the upbeat and the bizarre. In some instances such changes of format have been more a signal of impending demise than a panacea for economic recovery, but even when the tabloid format has produced financial success, this success has come at the cost of product quality. The fourth response was the acquisition of smaller papers. For example, the Hearst Corporation acquired twenty-eight shoppers and two small dailies in the Los Angeles area in an effort to bolster circulation of the ailing *Los Angeles Herald-Examiner* in its losing battle against the *Los Angeles Times*. However, this form of survival is expensive,

Who says what is "quality" in ideas?

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ing or afternoon field, the arrangement was not an unreasonable restraint of competition. This case has been soundly criticized for its classification of morning and afternoon advertising as a single product and for the resultant conclusion that the sole morning paper did not exercise market dominance. *See, e.g.*, S. OPPENHEIM & C. SHIELDS, *supra* note 7, §§ 82, 85, 87; Lee, *supra* note 23, at 1257-62. The Court's ruling was substantially revised in Northern Pac. Ry. v. United States, 356 U.S. 1 (1958), which substituted the concept of sufficient economic power to produce "an appreciable restraint" on the market for the requirement of market dominance.

56. In Albrecht v. Herald Co., 390 U.S. 145 (1968), the Supreme Court held that, absent an express antitrust exemption, any agreement between a seller and distributor fixing the price at which the distributor may resell the product is a per se violation of Sherman Act § 1.

57. Knowing that such promotional offers were always available, subscribers frequently cancelled after two months in order to resubscribe at cut rates. The loss of subscription revenue was compounded by the added bookkeeping costs in keeping track of starts and stops.

58. Predictably, the second place *Examiner* tried harder and put even more pressure on the revenue side of both newspapers. The two began a series of promotions that continued until both papers were losing money. The result of this struggle was the institution of a joint operating arrangement. *See infra* notes 80-84 and accompanying text; *see also* Note, *Failing Newspaper*, *supra* note 24, at 470.

and its use only underscores the suicidal intensity of intracity competition.

Far and away the most dramatic and successful response to the threat to survival of competing newspapers in metropolitan areas has been the joint operating arrangement. A joint operating arrangement is a merger of the noneditorial and nonreportorial functions of two or more newspapers. The most frequently combined functions are production facilities, circulation departments, and advertising departments. First developed in 1933 by two newspapers in Albuquerque, New Mexico, the JOA was adopted over the next three decades by newspapers in twenty-one other cities. Although critics claim that these arrangements are indistinguishable on a commercial level from a full merger,[59] defenders argue that they are less anticompetitive than mergers since the newspapers involved generally continue to engage in some degree of commercial competition.[60] At least one commentator has observed that the reduction or elimination of commercial competition leads to heightened competition in other areas and thus increases the quality of reportorial and editorial services.[61] In any event, there is no doubt that JOAs have preserved several newspapers that otherwise would have failed.[62]

JOA - way to survive

Conflict with the antitrust laws was inevitable, however, since price fixing, profit pooling, and market allocation were often the very objectives of the JOA.[63] Until 1968, the frail authority for such combinations was generally found in a liberal interpretation of the "failing company" doctrine of *Interna-*

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59. Note, *Critique*, *supra* note 23, at 393.

60. Roberts, *supra* note 23, at 351-52.

61. Judge Posner suggests that oligopolistic industries are likely to compete more vigorously in nonprice areas of service than unconcentrated industries, effectively substituting noneconomic competition. *See* R. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 11-12 (1976).

62. Parks, *Fold or combine: It's a matter of dollars*, ADVERTISING AGE, July 19, 1982, § 2, at M-31, M-33; *cf.* Note, *Seattle Application*, *supra* note 23, at 672 ("Joint operating newspapers can survive in areas that would not support commercially competing newspapers.").

Only one of 24 JOAs has been unable to rescue a newspaper caught in the downward spiral. In St. Louis, where the *Globe-Democrat* and the *Post-Dispatch* have operated under a JOA since 1979, the market was undercut by two free distribution papers. Even with the JOA, the *Globe-Democrat* [illegible] than the *Post-Dispatch* was making. In November 1983, the owners of the *Globe-Democrat* announced that it was closing the newspaper at the end of the year. Its intention to retain its interest in the joint agency, which would continue to publish the profitable *Post-Dispatch*, caught the attention of the Antitrust Division. *See infra* note 116.

63. *See* Knox, *supra* note 23, at 6.

tional Shoe Co. v. FTC.[64] In 1968, however, the viability of the JOA was jeopardized, as was the continued existence of the newspapers that were parties to the twenty-two JOAs then in existence. In that year a federal district court held, in *United States v. Citizen Publishing Co.*,[65] that the 1940 JOA between the *Arizona Daily Star* and the *Tucson Daily Citizen* was a per se violation of section 1 of the Sherman Act. The newspapers argued for a rule of reason analysis and asserted the failing company doctrine as a defense, but the court chose to interpret narrowly the test established in *International Shoe*.[66] The potentially devastating consequences of this decision sent a wave of anxiety through the newspaper business. As the *Citizen* case proceeded toward the Supreme Court, a threatened industry turned to Congress.

C. *The Congressional Response: The Newspaper Preservation Act of 1970*

In 1969, the Supreme Court handed down its decision in *Citizen Publishing Co. v. United States*.[67] The Court affirmed the district court's decision, dissolved the Tucson JOA, and articulated a standard for the failing company defense that effectively put an end to JOAs. Simply stated, the requirements for invoking the failing company defense were (1) the weaker newspaper must be facing the substantial probability of financial failure; (2) the failing paper must have no alternative to shutting down the presses other than the JOA; and (3) the failing paper must have attempted, unsuccessfully, to find a purchaser other than the stronger paper. In a Catch-22 pronouncement, Justice Douglas said in effect that the willingness of a stronger paper to enter into the JOA was presumptive evidence that the weaker paper was not failing, since if the weaker paper were in fact failing and had exhausted all alternatives, the stronger paper would simply let it fail and thereby fall heir to the entire market at no

64. 280 U.S. 291 (1930). In this case the Supreme Court refused to enforce an FTC order requiring the nation's largest shoe manufacturer to divest itself of its stock in another shoe manufacturing company. The Court held that a defense to § 7 of the Clayton Act existed when, at the time of the acquisition, the acquired company's assets were "so depleted and the prospect of rehabilitation so remote that it faced the grave probability of a business failure with resulting loss to its stockholders and injury to the communities where its plants were operated." *Id.* at 302.

65. 280 F. Supp. 978 (D. Ariz. 1968).

66. *See id.* at 992-94.

67. 394 U.S. 131 (1969).

cost."[68] It became clear that if any of the twenty two JOAs across the nation were to survive, protection would have to come from Congress.

In July 1967, responding to the district court's ruling and anticipating an adverse decision by the Supreme Court, Congress commenced hearings on Senate Bill 1312.[69] Known at that time as The Failing Newspaper Act, the bill was sponsored by Senator Carl Hayden of Arizona. During the three years preceding the enactment of the Newspaper Preservation Act, Congress heard testimony from 168 witnesses and produced a record of 5201 pages. In addition, 150 pages of the *Congressional Record* were devoted to floor debate on the bill during the same period. In those hearings and debates, frequent reference was made to the progress of the *Citizen Publishing* litigation through the appellate courts, and within two months of the Supreme Court's decision, Congress was ready to override it. On July 24, 1970, President Richard Nixon signed the Act into law.[70]

The language Congress employed in the NPA to achieve its purpose is simply stated and easily summarized. First, Congress declared that pursuant to its purpose[71] of "maintaining a newspaper press editorially and reportorially independent and competitive in all parts of the United States," newspaper publications could merge everything but editorial functions through JOAs formed in accordance with the provisions of the Act.[72] The Act thus provides a limited exemption from the antitrust laws to qualified JOAs.[73] A preexisting JOA qualifies if no more than

NPA provisions

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68. *Id.* at 137-38. This concept has not died easily. *See* discussion of the Seattle JOA, *infra* notes 120-36 and accompanying text.

69. S. 1312, 90th Cong., 1st Sess., 113 CONG. REC. 7067 (1967). For a discussion of the bill as originally introduced, see Flynn, *Antitrust and the Newspapers: A Comment on S. 1312*, 22 VAND. L. REV. 103 (1968).

70. Pub. L. No. 91-353, 84 Stat. 466 (1970) (codified at 15 U.S.C. §§ 1801-1804 (1982)).

71. For an interesting discussion of the use of statements of purpose in federal legislation, see Hammond, *Embedding Policy Statements in Statutes: A Comparative Perspective on the Genesis of a New Public Law Jurisprudence*, 5 HASTINGS INT'L & COMP. L. REV. 323 (1982).

72. 15 U.S.C. § 1801 (1982).

73. The general scope and operation of the Act has been summarized as follows:

> The antitrust exemption of the Newspaper Preservation Act does not provide antitrust immunity for newspapers. The exemption extends only to those aspects of a joint operating agreement listed in the definition of such agreements or arrangements. The exemption is available only when one of the participating newspapers is in a failing condition. The exemption does not change antitrust enforcement, under the Sherman, Clayton, or Federal Trade Commis-

one of the publications involved was, at the time of the arrangement's inception, likely to become or remain a "financially sound publication," regardless of ownership or affiliation.[74] A JOA established after July 24, 1970, can qualify by obtaining the written consent of the United States Attorney General after he or she determines that no more than one of the newspapers involved is a publication other than a "failing newspaper," and that approval would "effectuate the policy and purpose" of the Act.[75] The Act defines a failing newspaper as a publication that is in "probable danger of financial failure."[76] The NPA's final section effectively reversed *Citizen Publishing* by allowing reinstatement of the qualifying pre-Act JOA previously held to be in violation of the antitrust laws.[77]

II. The Courts' Attempts to Interpret the NPA

Despite the apparent simplicity of the NPA's language, the task of deciding what it means and of applying the Act's criteria to specific situations has not been easily accomplished. Because of the absence of previous judicial construction of the Act, the courts in *Pacific Sun Publishing Co. v. Chronicle Publishing Co.*[78] and *City of Honolulu v. Hawaii Newspaper Agency*[79] were ruling on legal issues of first impression with regard to preexisting JOAs. Similarly, the Ninth Circuit was writing on a blank judicial slate when it articulated standards and principles applicable to approval of future JOAs in *Committee for an Independent P-I v. Hearst Corp.*[80]

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sion Acts, against the merger of two or more financially healthy newspapers. S. Oppenheim & C. Shields, *supra* note 7, § 51, at 191.

74. 15 U.S.C. § 1803(a) (1982).

75. *Id.* § 1803(b). The qualifying section, § 1803, concludes by providing that there is no exemption for predatory pricing, other predatory practices, or "any other conduct in the otherwise lawful operations of a joint newspaper operating arrangement which would be unlawful under any antitrust law if engaged in by a single entity." *Id.* § 1803(c).

76. *Id.* § 1802(5).

77. *Id.* § 1804(a). The House Judiciary Committee Report was more specific in mentioning the *Citizen Publishing* case by name: "H.R. 279 as amended by the Committee is designed to accomplish the following objectives: . . . 4. To permit the joint newspaper operating arrangement in Tucson, Arizona, to be reinstituted notwithstanding the opinion of the Supreme Court in *Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969)." H.R. Rep. No. 1193, 91st Cong., 2d Sess. 3, *reprinted in* 1970 U.S. Code Cong. & Ad. News 3547.

78. Civ. No. 75 1845 RPA (N.D. Cal. June 15, 1981).

79. 559 F. Supp. 1021 (D. Hawaii 1983).

80. 704 F.2d 467 (9th Cir.), *cert. denied*, 104 S. Ct. 236 (1983).

In order to determine the state of the NPA with respect to JOAs that antedated the NPA, this article will first review the recent decisions in *Pacific Sun* and *Honolulu*. After analyzing the widely differing standards used in each case, the authors will discuss the major areas of conflict and propose a standard consistent with the intent of the Act. Decisions dealing with applications for approval of prospective JOAs will then be considered, beginning with the opinion of Administrative Law Judge Moore in *Application by The Cincinnati Enquirer, Inc.*[81] and concluding with an analysis of the Ninth Circuit's decision in *Independent P-I*. Finally, the authors will analyze problems created by the Ninth Circuit's opinion and suggest standards for deciding future cases.

A. Preexisting JOAs

1. The Pacific Sun *case*

Pacific Sun Publishing Co. v. Chronicle Publishing Co.[82] involved the first preexisting JOA to be tested under the Act. For the first time, a court was called upon to make evidentiary rulings and to articulate jury instructions construing the Act. *Pacific Sun* is of particular interest because two courts were required to prepare jury instructions and interpret the Act. The first trial (*Pacific Sun I*) resulted in a hung jury in 1979. After being reassigned to a different judge for retrial in 1981 (*Pacific Sun II*), the case ended with a verdict in favor of the defendant newspapers.

Both *Pacific Sun* trials were bifurcated by stipulation of the parties to enable the NPA defense to be tried first. Therefore, the question presented to each jury was whether, at the time the JOA was first entered into, more than one of the defendant San Francisco newspapers, regardless of ownership or affiliation, was likely to remain or become financially sound.[83] A comparison of the two *Pacific Sun* courts' interpretations of the crucial phrases emphasized above and a comparison of those instructions with the charge given in *Honolulu* demonstrate the incredible range of confusion the NPA has produced.

a. Factual background. For decades, the "newspaper of rec-

81. Dep't of Justice Docket No. 44-03-21-4 (May 1, 1979) (recommended decision) [hereinafter cited as *Cincinnati*].

82. Civ. No. 75-1845 RPA (N.D. Cal. June 15, 1981).

83. *See* 15 U.S.C. § 1803(a) (1982).

ord" in San Francisco was the *San Francisco Examiner*. Its dominance was threatened in the early 1960s, however, as the *San Francisco Chronicle*, inspired by an imaginative and iconoclastic editor, revamped its product and began making substantial gains in circulation relative to the *Examiner*.[84] Despite the *Examiner*'s heavy and expensive promotional efforts, the *Examiner* continued to lose readership to the *Chronicle*. In 1961, the *Chronicle* became the daily circulation leader, and by 1965 its daily circulation exceeded the *Examiner*'s by more than 60,000. The *Examiner* had slipped into the downward spiral.[85]

SF Examiner and Chronicle

Even though it appeared to have the advantage of momentum, the *Chronicle* still had not arrived at the point of profitable operation.[86] In fact, the *Examiner*'s retaliatory promotional efforts required a response by the *Chronicle* that caused both newspapers to suffer huge losses. Moreover, despite its apparent success, the *Chronicle* could not be certain that the Hearst Corporation would not invest a substantial amount of its national resources in an attempt to resuscitate the fortunes of its San Francisco "flagship" publication. It soon became clear to the managements of both the *Chronicle* and the *Examiner* that unless the intense competition between them was alleviated in some lawful manner, San Francisco would be left with only a single daily newspaper and that the remaining newspaper would be severely crippled by the battle. Faced with these circumstances, Randolph Hearst proposed to the *Chronicle*'s publisher the formation of a joint operating arrangement. After protracted negotiations, a JOA was executed in 1964.[87]

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84. These gains may possibly be explained by a number of changes in the style and format of the *Chronicle*, coupled with an aggressive promotional campaign.

85. *See supra* notes 47-50 and accompanying text. This phenomenon was also claimed by Pacific Sun in its complaint:

> The unavailability of additional advertising revenues also deprived Pacific Sun of revenues which would be used to promote and increase the circulation of *The San Francisco Pacific Sun*; the resulting gain in circulation would have led to a further increase in advertising revenues, which would have provided the funds for additional circulation gains, and so forth, in a cumulative effect well known in the newspaper industry.

Complaint at 12, Pacific Sun Publishing Co. v. Chronicle Publishing Co., Civ. No. 75-1845 RPA (N.D. Cal. June 15, 1981).

86. The *Chronicle* incurred losses in all years from at least 1954 through 1964, with the sole exception of 1956.

87. A condition precedent to the implementation of the JOA was the fullest possible assurance from the Department of Justice that the operations contemplated were in compliance with the law. Accordingly, the parties submitted financial data that established, among other things, that over the five-year period from 1960 through 1964 the

In order to achieve the desired integrative efficiencies available under a JOA, three daily newspapers[88] were reduced to a morning daily-except-Sunday newspaper, the *Chronicle*, and an afternoon daily-except-Sunday newspaper, the *Examiner*. The two Sunday newspapers were similarly reduced to a single Sunday publication. Recognizing that the morning newspaper that took the afternoon slot would certainly decline in circulation and advertising, the two publications agreed to divide combined profits or losses equally. Finally, the San Francisco Newspaper Printing Company ("Printco") was formed to perform circulation, advertising production, and other noneditorial functions, using selected equipment and personnel from both papers. Each newspaper maintained its separate and independent editorial staff as required by the NPA.

Following several skirmishes,[89] the most serious attack on this arrangement came on September 3, 1975, from the Pacific Sun Publishing Company (Pacific Sun), which had published a weekly newspaper in Marin County, California, since 1963. On that day, Pacific Sun filed suit alleging violations of sections 1 and 2 of the Sherman Act. Pacific Sun claimed to have been seriously disadvantaged by combination rates and other features of the joint operating arrangement. In 1979 the case came to trial. Thus, fifteen years after the *Chronicle* and the *Examiner* had formed their JOA and nine years after passage of the News-

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combined losses of the *Examiner* and the *News Call-Bulletin* exceeded $15 million, $9 million of which was attributable to the *Examiner*.

On the basis of this consistent pattern of losses, for which no financially practical solution existed, and after extensive consideration and examination of the matter, the Department of Justice sanctioned the JOA. The Attorney General of the United States wrote to Hearst on August 30, 1965, and to the *Chronicle* on September 7, 1965, stating:

> On the basis of your submissions and our further review of the heavy losses being suffered by the Hearst newspapers in San Francisco, I wish to advise you that it is not the present intention of the Department of Justice to initiate antitrust action against the implementation of the proposed production plan.
>
> As you know, we are presently reviewing a number of other newspaper transactions which could conceivably raise related problems. Accordingly, the Department must, of course, be free to take any future action which may be required to insure equality of treatment should the question arise.

Letter from Nicholas de B. Katzenbach, Attorney General of the United States, to William J. Manning (Aug. 30, 1965).

88. The *Examiner* also published an afternoon paper, the *Call-Bulletin*.

89. *See, e.g.*, Bay Guardian Co. v. Chronicle Publishing Co., 318 F. Supp. 227 (N.D. Cal. 1970) (order denying motion to convene three-judge court); 340 F. Supp. 76 (N.D. Cal. 1972) (action for declaratory judgment); 344 F. Supp. 1155 (N.D. Cal. 1972) (order denying motion to strike answer).

paper Preservation Act, the question of whether a preexisting JOA was entitled to significant antitrust immunity was ready for its first court test. The battle lines were drawn.

b. Pacific Sun I. The trial strategies of the parties dictated the conflicting interpretations of the Act's key phrases that were urged on the *Pacific Sun I* court. In particular, Pacific Sun desired to take advantage of the difference in size between its tiny publication and the giant defendants. Pacific Sun logically wanted to impress the jury with evidence that the *Examiner*'s huge historical earnings had been drained off by the Hearst Corporation and to argue that the availability of this capital was proof of the *Examiner*'s financial soundness. In addition, Pacific Sun wanted to argue that the Hearst Corporation had not exhausted all alternatives to a JOA when it entered into one in 1964 and that the papers were merely exploiting the NPA's easy road to massive profits.

With no pre-Act JOA decisions to guide it, the court looked to the 1977 opinion of Administrative Law Judge Donald Moore in *Cincinnati*, which presented an analysis of a post-Act application. Although the statutory standards for pre-Act and post-Act applications are different, the *Pacific Sun I* judge substantially adopted Judge Moore's analysis and applied it to the pre-Act case before him. Confusion was inevitable, and a hung jury resulted, with a majority voting for the plaintiffs. The court's treatment of the NPA's key standards for qualification warrants discussion:

(1) "Regardless of ownership or affiliations." The defendants argued that the phrase "regardless of ownership or affiliations" in the NPA reflected the congressional intent that qualification for the Act's protection be determined solely by reference to the profit-and-loss statement of the publication in question, excluding reference to its owner's ability to infuse capital to keep it afloat. Pacific Sun argued that the jury should consider the millions in profits "drained" by the Hearst Corporation from the *Examiner* in earlier successful years in order to determine whether capital was in fact available to make the *Examiner* profitable. The court essentially resolved this conflict in the plaintiff's favor.[90]

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90. At various points, the court instructed the jury in language similar to the following:

> [Y]ou may consider the profits received by Hearst Publishing Company, Inc., Hearst Consolidated Publications, Inc., or the Hearst Corporation from the op-

(2) "Likely to become a financially sound publication." The other major area of conflict centered on the key phrase "likely to become a financially sound publication." Pacific Sun argued that the phrase implied that the jury should hear testimony critical of the *Examiner*'s management and should be permitted to conclude that different or better management decisions would "likely" have made the *Examiner* financially sound without recourse to the JOA. In essence, the plaintiff urged that the statutory test be read "could have become financially sound if the publication had been managed differently"—in effect a "reasonable manager" standard.

The defense argued that because Congress's concern focused on preserving competing editorial voices, the sole relevant consideration was the newspaper's condition at a specific point in time, not the process by which the paper got that way. Further, since, by definition, poorly managed newspapers would be those most likely to be threatened with extinction, they would be those most in need of preservation. Moreover, the defendants argued that if Congress had intended "likely to become" to mean "could have become," it would have said so. Its refusal to impose such a standard, despite constant importuning by NPA critics, reflected Congress's clear intention to reject the interpretation urged by the plaintiff.

The plaintiff also won this battle. The court overruled the defendants' objections and permitted evidence critical of the *Examiner*'s management to come in. Nevertheless, the judge seemed troubled by the points raised by the defendants, and his instructions reflected his ambivalence. For example, the judge instructed the jury, consistent with the defendants' position, that the "[d]efendants need not have undertaken or attempted to implement all possible or available alternatives before entering into the joint operating agreement,"[91] yet he also instructed as follows:

> eration of the Examiner in evaluating the extent of capital available for its operations or business needs. . . . In determining whether a newspaper publication is likely to remain or become financially sound you may consider . . . availability of capital from shareholders . . .

Court's Jury Instructions at 3818:25 to 3819:4, 3820:25 to 3821:7, *Pacific Sun I*. Such an instruction seems clearly contrary to the congressional intent. *See* S. REP. No. 535, 91st Cong., 1st Sess. 5 (1967) *reprinted in* S. OPPENHEIM & C. SHIELDS, *supra* note 7, § 58, at 216.

91. Court's Jury Instructions at 3822:2 to :4, *Pacific Sun I*.

> Now in determining whether these newspapers were likely to remain or become financially sound you may consider each of the following: Possible available alternatives to a joint operating agreement, . . . whether defendants had considered 'all means reasonably available' to them to make their publications profitable newspapers, whether there was any reasonable likelihood that the infusion of new ownership or management would have improved defendants' operating results sufficiently to preserve defendants as separate commercial entities in the absence of a joint operating agreement, the feasibility of curative measures short of entering into a joint operating agreement, all measures which persons with reasonable skill and judgment in the newspaper business could have used in operating these newspapers . . . .[92]

In permitting the jury to consider available alternatives to a JOA and whether new management could have done a better job, without providing any guidelines on how these factors should influence the ultimate determination, the court set the jury adrift. The instructions on these issues undoubtedly contributed to the jury's confusion and its inability to reach a verdict. Thus, despite the plaintiff's success in persuading the trial judge to give instructions that substantially reflected its version of the Act, the plaintiff was forced ultimately to proceed with a second trial before a new jury.

c. Pacific Sun II. The second *Pacific Sun* case was assigned to a new judge for trial. After initially expressing his intention to retry the case under the same instructions used in *Pacific Sun I*, the judge reconsidered his decision and developed his own instructions.

(1) "Regardless of ownership or affiliations." With respect to the phrase "regardless of ownership or affiliations," the court instructed the jury to look at each defendant newspaper "as if it were an independent entity, not owned or controlled by or affiliated with any other corporation."[93] The judge further advised the jury not to consider whether additional funds or resources

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92. *Id.* at 3819:20 to 3820:12. The court's ambivalent instructions on this issue appear to have been the result of reference to *Cincinnati*, discussed *infra* notes 111-19 and accompanying text. Indeed, in settling the proposed jury instructions, that opinion was quoted and argued extensively by the plaintiff. The use of that opinion in *Pacific Sun* is criticized below. *See infra* notes 95-97 and accompanying text.

93. *See* Defendant's Proposed Supplemental Instruction No. 23:6-8, *Pacific Sun II* (no transcript was made of the *Pacific Sun II* trial, and hence all jury instructions from that trial are cited to typed copies of proposed instructions actually given by the court).

from the owners might have enabled the *Chronicle* or the *Examiner* to stay afloat.

(2) "Likely to become a financially sound publication." With respect to whether the *Examiner* was "likely to become a financially sound publication," the judge modified his predecessor's instructions but revealed himself to be still somewhat under the influence of the *Cincinnati* opinion. Like his predecessor, he continued to treat the exhaustion of all alternatives to the JOA as a prerequisite to the defendants' qualification for protection under the NPA. The ghost of *Citizen Publishing* once again stalked the courtroom.

Although the jury was advised that "[b]ad or negligent management does not disqualify the defendants from the protection of the Newspaper Preservation Act," they were also instructed basically as follows:

> The evidence proffered by plaintiffs shows that defendants themselves considered various alternatives to the joint operating agreement. If you find that defendants in fact considered these alternatives but rejected them, you may consider such evidence with respect to whether the defendants chose the most profitable alternative, rather than the only alternative for the financial success of the papers.
>
> In determining whether defendants' newspapers were likely to remain or become financially sound publications, you may consider whether the defendants have exhausted all means reasonably available to them to make their publications profitable newspapers.
>
> In determining whether defendants' newspapers were likely to remain or become financially sound publications, you may consider whether there was any likelihood that the infusion of new management would have improved the defendants' operating results sufficiently to preserve the defendants as separate commercial entities in the absence of a joint operating agreement.
>
> In determining whether defendants' newspapers were likely to remain or become financially sound publications, you may consider the feasibility of curative measures short of entering into a joint operating agreement.[94]

Despite their continuing preoccupation with the exhaustion of alternatives, the instructions presented a more balanced inter-

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94. Plaintiff's Proposed Instruction Nos. 81:4-10; 46:3-7; 49:1-9; 50:1-6, *Pacific Sun II*.

pretation of congressional intent, and the jury returned a unanimous verdict for the defendants.

d. Analysis of Pacific Sun. Although the *Cincinnati* opinion was useful with reference to some of the questions before the two *Pacific Sun* courts, it could only have misled the courts on the most critical issues. The differences between pre-Act JOAs and post-Act JOAs were debated at length in Congress, and Congress clearly intended that different standards be applied in each situation.

With respect to JOAs that antedated the Act, the House of Representatives' report reads as follows:

> H.R. 279 as amended by the Committee is designed to accomplish the following objectives:
>
> . . . .
>
> 2. To grant a limited exemption from the antitrust laws for joint newspaper operating arrangements that have been entered into prior to the effective date of this Act in twenty-two cities, communities, or metropolitan areas of the United States.[95]

With respect to prospective joint operating arrangements, however, the test was more stringent. The differing standard to be applied to proposed JOAs was articulated by Senator Hruska, a supporter of the Act:

> Before any new joint operating arrangements could come into being, the papers involved would be required to come before the Attorney General for his approval. . . .
>
> . . . [This] will act as a brake upon other newspapers which might otherwise prematurely turn to joint operating arrangements, without testing other means of maintaining full commercial and editorial competition.[96]

The critical differences between the standards applicable to JOAs already in effect when the Act was passed and those applicable to prospective JOAs had also been noted by Judge Moore:

> On the one hand, the test applicable to prospective arrangements, as here, is more stringent than that applied to arrangements already in effect when the Act was passed. For existing arrangements, it was necessary that, at the time the arrangement was entered into, not more than one of the news-

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95. H.R. Rep. No. 1193, 91st Cong., 2d Sess. 3, *reprinted in* 1970 U.S. Code Cong. & Ad. News 3547.

96. 116 Cong. Rec. 2006 (1970).

> papers "was likely to remain or become a financially sound publication." As Congressman Railsback stated in floor debate on the bill, the test applied to prospective arrangements was "substantially changed" to provide a "tougher" and "much more stringent" definition than the "financially sound" test that had been applied both to existing and to prospective arrangements in an earlier version of the bill.[97]

Although the legislative history does not demonstrate a clear congressional intent that the duty to explore or exhaust alternatives should apply only to post-Act JOAs, the history does show that (1) the duty to explore alternatives would apply to prospective JOAs; and (2) pre-Act and post-Act arrangements were to be tested under different standards, with those for pre-Act JOAs being more lenient.

Section 1803(a) requires an assessment of the ability of a newspaper, failing at the time it entered into a JOA, to have become financially sound without the JOA. Although the availability of alternatives is logically relevant to this assessment, imposing such a requirement on pre-Act JOAs makes little practical sense. For example, a retrospective finding by either of the *Pacific Sun* juries that the *San Francisco Examiner* had not exhausted all of its alternatives to a JOA, or that different management could have made a difference, would have (1) disqualified the newspaper from the Act's protection; (2) required the dismantling of the joint operating arrangement; and (3) imposed huge antitrust damages. By contrast, a finding that applicants for a prospective JOA have not exhausted reasonable alternatives would simply send the allegedly failing newspaper back to the drawing board for another try, without prejudice to reapplication after the alternatives fail. Amid this confusion over standards, the stage was set for another district court to give the section 1803(a) standard yet another interpretation.

2. *The* Honolulu *case*

A few months after the *Pacific Sun II* jury returned its verdict for the defendants, the case of *City of Honolulu v. Hawaii Newspaper Agency*[98] went to the jury, thus providing a third district court judge the opportunity to construe the NPA.

a. Factual background. Honolulu has two major newspa-

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97. *Cincinnati, supra* note 81, at 119 (citations omitted).
98. 559 F. Supp. 1021 (D. Hawaii 1983).

pers, the morning *Honolulu Advertiser* and the afternoon *Honolulu Star-Bulletin*. After making small profits from 1956 through 1958, the *Honolulu Advertiser* began to suffer losses each year, while the rival *Honolulu Star-Bulletin* grew stronger and stronger. The coup de grace was administered in 1960 when the *Star-Bulletin* began publishing a Sunday edition that seriously undermined the *Advertiser*'s circulation. The *Advertiser* was trapped in the downward spiral and appeared to be headed for extinction.

In May 1962, the Persis Corporation, publisher of the *Honolulu Advertiser*, and the Gannett Pacific Corporation, publisher of the *Honolulu Star-Bulletin*, entered into a joint operating arrangement. The agreement established the Hawaii Newspaper Agency, Inc. to publish a combined Sunday edition and to set individual and combination advertising rates.[99]

For seventeen years, the Hawaii JOA operated without challenge. On March 23, 1979, undoubtedly encouraged by the construction placed on the NPA in *Pacific Sun I* and by the plaintiff's near victory there in the first trial, the City and County of Honolulu filed a class action alleging that Persis, Gannett, and the Hawaii Newspaper Agency had violated sections 1 and 2 of the Sherman Act. The defendants raised the NPA as a defense and moved for dismissal on the ground that the Act effectively "grandfathered" the twenty-two JOAs in existence when the Act was passed. They also moved for dismissal on grounds that the statute of limitations had run.

After reviewing the legislative history of the Act, Judge Curtis denied the motion for dismissal, concluding that there was no congressional intent to grandfather the defendants so as to relieve them of the necessity of proving, if challenged, that they qualified for the NPA's limited exemption.[100] He also concluded,

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99. *See* S. Oppenheim & C. Shelton, *supra* note 7, § 56, at 205.

100. In denying defendants' motion to dismiss, the court relied almost exclusively on the legislative history of the Act. It emphasized the following statement by Senator Hruska:

> The language in [§ 1803](a) provides for a grandfather clause of sorts. But it is not a complete "grandfathering" of all joint operating arrangements now in existence without regard to the circumstances and situations which led them to enter into these arrangements. The existing joint operating arrangements would be subject to a testing by the courts under the definitions provided in this bill. If a court were to determine that one or more papers did not, at the time of entering a joint operating arrangement, meet the test, then such papers would be subject to existing antitrust law.

City of Honolulu v. Hawaii Newspaper Agency, Civ. No. 79-0138-JWC, slip op. at 7 (D.

without prejudice, that there was no statute of limitations bar, at least for the four years prior to the filing of the action. The case then proceeded to trial solely on the NPA exemption defense and the defense of laches.

b. The Honolulu *instructions.* Although the *Honolulu* court had the benefit of the instructions given in *Pacific Sun I* and *Pacific Sun II*, it formulated yet another standard for testing pre-Act JOAs. In certain of its instructions to the jury, the *Honolulu* court adopted much of the language used in instructing the *Pacific Sun II* jury. There were differences, however, the most dramatic of which concerned the crucial "financial soundness" test.

The *Pacific Sun I* and *Pacific Sun II* juries were permitted to consider whether the defendant newspapers could have become financially sound if different management decisions had been made and in effect were instructed to deny defendants the protection of the NPA if the juries found that the defendants had not considered (or had considered and rejected) reasonable alternatives to a JOA. By contrast, Judge Curtis determined that whether the *Advertiser*, the weaker newspaper, was likely to remain or become financially sound was a business judgment to be made at the time of the merger by the managing officers of the endangered publication, not by jurors with the benefit of hindsight. The judge instructed the jury that if it found "that the managing officers of the Honolulu Advertiser entered into the joint operating agreement in the honest belief that otherwise the Honolulu Advertiser was not likely to remain or become financially sound," then the jury must find that the defendants were entitled to the limited exemption of the NPA.[101] The court further advised the jury to examine the conduct of the *Honolulu Advertiser* using a reasonable man standard for the newspaper

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Hawaii Dec. 17, 1979) (quoting 116 Cong. Rec. 2005 (1970) (remarks of Sen. Hruska)). Congressman MacGregor had added a more sharply defined comment, which was also quoted by the district court:

> This bill does not grant antitrust immunity to all 22 joint operating arrangements. Such an exemption attaches only if the requirement in . . . [§ 1803(a)] is satisfied that not more than one of the newspapers involved . . . [was] a publication that "was likely to remain or become a financially sound publication." Whatever this standard means, it applies only when a particular joint operating arrangement was created.

Id. at 8 (citing 116 Cong. Rec. 23150 (1970) (remarks of Rep. MacGregor)).

101. City of Honolulu v. Hawaii Newspaper Agency, 559 F. Supp. 1021, 1027 (D. Hawaii 1983).

business, considering all the facts and circumstances existing at the time the JOA was formed. Thus, if the jury found that the managing officers of the Hawaiian newspapers had acted reasonably in a good faith exercise of their business judgment in entering into the JOA, the defendants were entitled to the protection of the Newspaper Preservation Act.

This standard was a dramatic reversal of the tests presented to the juries in *Pacific Sun I* and *Pacific Sun II*. It moved a step closer to the interpretation the newspapers had unsuccessfully urged upon the *Pacific Sun II* court—that in enacting the NPA, Congress was concerned that the citizens of a community might be deprived of two editorial points of view and, thus, was less concerned with how a newspaper got in trouble than with the fact that it was in trouble. Even under this new relaxed test, however, the *Honolulu* jury was unable to reach a unanimous verdict, and the court was forced to declare a mistrial.

c. The motion for judgment notwithstanding the verdict: statute of limitations and laches. Following the jury's inability to reach a verdict, the court proceeded to consider the previously submitted motion for a judgment notwithstanding the verdict. In a lengthy opinion, Judge Curtis concluded that the plaintiffs' ability to challenge the JOA's qualification for the NPA exemption arose the day the Act became effective. Consequently, this was not a situation falling within the traditional "continuing violation rule"[102] upon which the court's earlier rejection of the statute of limitations defense had been based, and plaintiffs had only four years from the effective date of the NPA to commence their action.[103] Since the case was not filed until nine years after the cause of action arose, it was barred.[104]

Judge Curtis's opinion then reviewed the evidence in light of congressional intent and reiterated his instructions to the jury. The likelihood of the *Advertiser*'s attaining financial soundness, wrote Judge Curtis, was "not a question of fact since it had not, nor could it ever occur." It was "a matter of judg-

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102. *Honolulu*, 559 F. Supp. at 1023-26 (citing Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321 (1971), and *In re* Multidistrict Vehicle Air Pollution, 591 F.2d 68 (9th Cir. 1979)).

103. 15 U.S.C. § 15b (1976). This section provides that "[a]ny action to enforce any cause of action under sections 15, 15a, or 15c of this title shall be forever barred unless commenced within four years after the cause of action accrued."

104. *Honolulu*, 559 F. Supp. at 1026. Having found the action barred by the statute of limitations, the court concluded that the defense of laches, while overwhelmingly supported by the evidence, was unavailable. *Id.*

ment as to what might occur in the future." The crucial question, of course, was "Whose judgment controls?"[105] After analyzing the NPA's legislative history, the court concluded that whether the *Advertiser* was likely to become financially sound was a business judgment to be made by the newspaper's officers. As long as this judgment had a reasonable basis in fact and was made in good faith, it should not be disturbed. A review of the evidence showed that the decision by the *Advertiser* was reasonable and was made in good faith.[106] Accordingly, the defendants fell within the exemption of the NPA and were entitled to judgment as a matter of law.[107]

3. Significance for future cases

Since no appellate court has yet considered cases involving pre-Act JOAs, the meaning of the Act remains uncertain. Will the reasonable man and good faith business judgment test of the *Honolulu* court be adopted, so that the primary question of fact for the jury is whether the newspaper's officers acted in good faith? Or will an appellate court impose on participants in pre-Act JOAs the burden of proving, many years after the fact, that they had exhausted all reasonable alternatives and that they could not have achieved financial soundness by adopting different management policies?

Balancing the possibility of anticompetitive abuse against Congress's clear desire to preserve independent editorial voices, it seems clear that the good faith standard articulated by Judge Curtis is the most workable of the tests that have been articulated so far and should be approved and adopted when the issue reaches the appellate courts.

As a practical matter, the way in which the standard under section 1803(a) is articulated may not have far-reaching consequences if Judge Curtis's statute of limitations analysis is adopted. Congress probably did not intend or anticipate that the twenty-two JOAs that antedated the Act would continue to be subject to attack more than thirteen years after the Act was passed, particularly when filing, or failing to file, is exclusively

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105. *Id.* at 1027.

106. *Id.* at 1028-32.

107. *Id.* at 1032. The named plaintiffs settled for a waiver of costs by the defendants. Subsequently, a group of intervenors moved the court for permission to appeal the case. This motion was granted, and the matter is now proceeding toward a hearing before the Ninth Circuit.

within the plaintiff's control. Put another way, the preservation-biased language of the Act does not readily support an interpretation that would permit a prospective plaintiff to delay filing until time erodes the defendants' capacity to shoulder their burden of proving they qualify for the NPA's protection.

A rejection of Judge Curtis's statute of limitations analysis would undermine the congressional purpose rather than promote stability. Even under the less stringent test articulated by the *Honolulu* court, the ability of newspapers (or of any other litigant) to establish good faith and reasonable business judgment decreases with the passage of time. The NPA's purpose would be subverted if JOAs were subject to attack by one plaintiff after another[108] until eventually, when witnesses had died or memories had faded to the point that defendants could no longer meet the burden of establishing their qualification under the Act, a plaintiff would at last succeed. The practical result reached by Judge Curtis's statute of limitations analysis is consistent with the purpose of the Act and provides the stability Congress intended for the twenty-two JOAs that antedated the Act.[109]

B. Proposed JOAs

1. The Cincinnati JOA

a. Factual background. In September 1977, the independent *Cincinnati Enquirer* and the *Cincinnati Post*, published by the E.W. Scripps Company, entered into a typical joint operating arrangement. The newspapers applied for approval by the Attorney General, who referred the matter to Administrative Law

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108. Under traditional res judicata principles, only the named plaintiff and his privies would be barred from subsequent attacks on JOAs on the grounds that the criteria of § 1803(a) had not been met. *See* Montana v. United States, 440 U.S. 147, 153 (1979). However, when the original action was a class action, or when potential plaintiffs could have intervened but chose not to, a different result may be justified. *See* Jackson v. Hayakawa, 605 F.2d 1121, 1125-26 (9th Cir. 1979).

109. Dictum in Judge Curtis's opinion suggested that a plaintiff who did not exist in 1970 would not be barred until four years had passed after the plaintiff came into existence. This invitation to further litigation is analytically unsound. The concept that 22 JOAs would have protection from everyone except newly formed businesses is artificial and inequitable.

An alternative analytical basis for barring future attacks on pre-Act JOAs would be to apply the four-year statute of limitations applicable to mergers. *See supra* text accompanying note 59, arguing that what is being attacked is, in effect, a merger of the economic activities of two or more newspapers.

Judge Donald Moore to conduct a hearing and to make recommendations regarding the application.

After seven weeks of hearings and consideration of more than 2000 pages of exhibits, Judge Moore concluded that the *Cincinnati Post* was a "failing newspaper" within the meaning of the Act. He recommended that the application be approved.[110] The Attorney General approved the application, adopting Judge Moore's findings and conclusions. No review of the Attorney General's approval was sought.

b. The Cincinnati *criteria.* In support of his recommendation, Judge Moore produced a detailed and scholarly opinion 143 pages in length. After commenting at length on the peculiar problems of the newspaper industry and the trends threatening the survival of competitive newspapers, Judge Moore observed that those general trends applied to the Cincinnati market. He noted the steady decline in the *Post*'s circulation and advertising linage, as well as the *Post*'s decline in percentage of market advertising revenues vis-a-vis the *Enquirer*. Judge Moore chronicled the *Post*'s continuing and increasing operating losses of more than $13 million between 1970 and 1978. In addition, he cited testimony projecting future losses for the *Post* of an additional $14 million through 1982.

Judge Moore then proceeded to discuss the steps taken by the *Post*'s owners in an effort to make the newspaper financially sound, concluding that none of these steps would have satisfactorily solved the *Post*'s problems. Finally, he considered new ownership as a possible solution. Although he found that Scripps had rejected overtures from possible buyers, Judge Moore found no basis in the record for "a determination that any party, and, more specifically, those parties who have expressed interest in buying the Post, could operate the newspaper more efficiently than Scripps."[111] Consequently, he found that the *Post* was a failing newspaper under section 1803(b).

In articulating the criteria applied in reaching his conclusions, Judge Moore reviewed the history and purpose of the NPA. He quoted the Senate Judiciary Committee's statement that the phrase "is in danger of probable failure" was "taken from the Bank Merger Act and has been the subject of a Supreme Court opinion in *United States v. Third National Bank*

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110. *See Cincinnati, supra* note 81.

111. *Id.* finding 315, at 110.

(390 U.S. 171 (1968))."[112] Judge Moore cited this discussion of the Bank Merger Act and of the Supreme Court's decision in *Third National Bank* and concluded, without expressly limiting his remarks to a prospective JOA (as distinguished from an existing JOA), "that a joint operating arrangement should be approved only if there are no alternative measures available that would permit continued publication of the allegedly failing newspaper."[113] On the other hand, in responding to the intervenors' argument that approval was precluded by Scripps's failure to explore the possibility of selling the *Post* to a competing buyer and its position that the *Post* was simply not for sale,[114] Judge Moore held that "the Post's failure to seek or to consider a noncompeting purchaser [was] not an absolute bar to approval of the joint operating arrangement"[115] when such an endeavor would have been futile, either because qualified purchasers were unavailable or the paper's condition would not have been materially improved by new ownership and new management.[116] Because the record failed to prove that qualified potential buyers existed or that new ownership would have improved the *Post*'s situation, Scripps's refusal to consider a sale of the paper in years past did not require rejection of the application.

Finally, Judge Moore addressed the Antitrust Division's argument that in deciding whether the *Post* was a failing newspaper, he should apply an "incremental analysis" of the *Post*'s operations by taking into account the extent to which Scripps realized tax benefits as a result of the *Post*'s losses. In effect, this analysis would require a judge to apply those tax savings back to the newspaper that generated them and to offset them against losses offered as proof of failing newspaper status. In a succinct and compelling discussion, Judge Moore observed that the incremental analysis approach contradicted the "regardless of its ownership or affiliations" language of the Act. In rejecting the

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112. S. REP. No. 535, 91st Cong., 1st Sess. 2 (1969). As discussed in the text accompanying note 159 *infra*, Judge Moore and the Senate Report are incorrect in so characterizing the *Third National Bank* case. *Accord* Note, *Seattle Application*, *supra* note 23, at 686 n.122. This error is one that, with the encouragement of the Justice Department, has refused to die.

113. *Cincinnati*, *supra* note 81, at 125.

114. *Id.*

115. *Id.*

116. *Id.* at 127.

incremental analysis theory, Judge Moore described it as "an artificial approach that does violence to the legislative intent."[117]

Judge Moore's recommendation was adopted by the Attorney General, although, as will be seen, the Antitrust Division was not discouraged from future attempts to assert the incremental analysis theory.[118] Because the intervenors chose not to carry the matter further, Judge Moore's analysis of the Act in the context of an application for a proposed JOA was not reviewed by any court. Nonetheless, the standards Judge Moore articulated have had an influence and life of their own that have extended far beyond the city limits of Cincinnati[119] and beyond the intended restriction to prospective arrangements under section 1803(b).

2. *The Seattle JOA*

a. Factual background. The *Seattle Post-Intelligencer* (*P-I*), a morning newspaper owned by the Hearst Corporation, is one of two major daily newspapers in Seattle. The other major daily is the *Seattle Times*, owned in large part by the Knight-Ridder group. The *Times* had been an afternoon newspaper until 1976, when it gradually began to be transferred into an all-day publication. By the end of September 1981, the *Times* exceeded the *P-I* in both circulation and operating revenues. The *P-I* had lost money steadily since 1969 and was clearly trapped in the downward spiral.

Following negotiations in 1980, the *P-I* and the *Times* agreed to enter a JOA in accordance with section 1803(b) of the NPA. They were to adopt joint advertising and circulation rates and to publish a single, combined Sunday edition. They agreed to pool profits and to share them according to a predetermined formula.

In March 1981, the Seattle Times Company and the Hearst Corporation submitted an application to the Attorney General for approval of their JOA. Pursuant to the Antitrust Division's recommendation, the Attorney General ordered that a hearing be scheduled and appointed Daniel H. Hanscom, a former Chief

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117. *Id.* at 135. *Accord* Note, *Seattle Application*, *supra* note 23, at 688-89.

118. *See infra* text accompanying notes 121-23.

119. *See supra* notes 89-97 and accompanying text (Moore's influence on pre-Act cases); *infra* notes 140-44, 147-50 and accompanying text (Moore's influence in *Independent P-I*).

Administrative Law Judge for the Federal Trade Commission, to conduct the proceedings. A collection of interested parties, consisting of a number of suburban newspaper publishers and three citizens' committees, was permitted to intervene and to participate in the hearings through a single legal counsel. The hearings took place in November 1981. Thirty witnesses testified,[120] and more than a thousand pages of exhibits were introduced.

When proposed findings and supporting briefs were filed at the conclusion of the hearings, the Antitrust Division predictably[121] opposed the application, urging many of the same arguments it had unsuccessfully advanced before Judge Moore in *Cincinnati*. The Antitrust Division argued that the test for qualification should contain the following requirements, which employ language closely paralleling the *Citizen Publishing* case: (1) the weaker newspaper will be closed down if the joint operating agreement is denied; (2) the weaker paper can show that it has no reasonable alternatives to the JOA;[122] (3) the applicants can demonstrate that new management or ownership would not be

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120. These witnesses included an expert who gave testimony similar to that given in *Pacific Sun* and who would later testify in *Honolulu*.

121. The Antitrust Division has not surprisingly been a troublesome thorn in the side of congressional intent, resisting inroads to the Sherman Act as if the NPA had never been enacted. Its efforts to date have been tenacious, if not always effective. In St. Louis, Missouri, however, Newhouse Publishing, the owner of the *Globe-Democrat* (a JOA participant with Pulitzer Publishing's *Post-Dispatch*, *see supra* note 62) announced in November 1983 that it was closing the *Globe-Democrat* at the end of the year, though retaining its interest in the joint agency, which would continue to publish the profitable *Post-Dispatch*. The Justice Department took the position that if the *Globe-Democrat* ceased publication, the joint operation would lose the protection of the NPA and the two owners would be evaluated under the merger standards of section 7 of the Clayton Act, thus requiring a twofold showing: (1) that the *Globe-Democrat* could not survive outside the JOA and (2) that it could not be sold to an independent competitor. The Department agreed that it would not oppose the closure if no potential buyer came forward within 15 days, *see* Wall St. J., Nov. 9, 1983, at 8, col. 1; N.Y. Times, Dec. 1, 1983, at A20, col. 3-4, and a buyer was sought. Jeffery Gluck, age 31, ultimately came forward and bought the *Globe-Democrat* which, in the tradition of Time, Inc.'s acquisition of the *Washington Star*, Charter Oil's purchase of the *Philadelphia Bulletin*, and Joseph Cole's taking over at the *Cleveland Press*, continues to lose money in the hands of its new owner.

While it can reasonably be argued that the Division's threat was both right and successful in barring a JOA newspaper owner from closing down its own paper without first trying to find a successor to compete with its other remaining interest in the market, the change in ownership did not "alter the fact that these papers were failing. It just means that the failing [will] go on a little longer at a cost of millions for the unfortunate buyers." Morton, *St. Louis*, *supra* note 22, at 16.

122. This was the only argument advanced by the Antitrust Division in the Seattle case that was adopted by Judge Moore in *Cincinnati*.

likely to materially improve the weaker paper's condition; (4) the weaker paper can show that any interested potential buyer was not in fact qualified to purchase the paper; and (5) the alleged losses cannot largely be erased by offsetting against them the tax benefits to the owner (the previously rejected incremental analysis theory).[123]

Despite the Division's attempt to block the application, the Administrative Law Judge provided the Attorney General with findings of fact and legal analysis supporting approval of the proposed JOA.[124] The Attorney General thereafter approved the JOA application, adopting all but one of the Administrative Law Judge's proposed findings of fact and adopting all of the recommended conclusions of law.

b. The findings and recommendations of the Administrative Law Judge and the Attorney General. Judge Hanscom's proposed findings began with a discussion of trends in the newspaper industry and an analysis of the economic forces affecting the publishing business in light of the specific characteristics of the Seattle market. The judge concluded that the *P-I*'s declines in circulation and advertising, together with its enormous increasing losses, epitomized the characteristics of a failing newspaper.[125] He found that the *P-I* had fallen into the downward spiral and that no newspaper had ever been able to reverse a trend like the *P-I*'s.[126] Accordingly, he concluded that losses for the *P-I* could be expected only to increase, that it was unlikely that any steps by Hearst or by a new owner could improve the newspaper's likelihood of survival, and that the *P-I* had "fallen so far behind, the probability is that its decline is irreversible."[127] Judge Hanscom rejected the claim of the intervenors and the Antitrust Division that new or different management could have solved the *P-I*'s problems.[128]

Proposed finding 158, however, provided some solace to the intervenors and a hook on which to hang future efforts to block the Seattle JOA:

> Considering that the Post-Intelligencer is not, and has not

123. *See supra* note 117 and accompanying text.

124. Application of Seattle Times Co., Dep't of Justice Docket No. 44-03-26-6, slip op. at 103 (Jan. 14, 1982) (recommended decision of Hanscom, A.L.J.).

125. *Id.* findings 24-94, 131-36, at 19-48, 71-73.

126. *Id.* finding 123, at 66.

127. *Id.* finding 144, at 76; *see also id.* findings 110-15, 147-55, at 56-62, 78-82.

128. *Id.* finding 109, at 56.

> been for sale, and that all inquiries regarding possible purchase have been rebuffed by the Hearst Corporation with statements to that effect, and that responsible prospective purchasers nevertheless continue to appear and express an interest in buying the Post-Intelligencer, it must be concluded that the Post-Intelligencer could in all probability be sold at fair market value to a person or firm who could, and would, continue it in operation as an independent metropolitan daily.[129]

However, in the memorandum opinion following his proposed findings of fact, Judge Hanscom flatly stated that despite proposed finding 158, the NPA did not require the Hearst Corporation to offer the *P-I* for sale, nor did the *P-I* have to prove that it could not be sold to a buyer willing and able to continue it in operation as an independent publication.[130] The Judge based this conclusion on the ground that Congress had specifically rejected the Supreme Court's requirement, stated in *Citizen Publishing*, that in order to fall within the failing company exemption, the failing newspaper's owner would have to make an effort to sell the paper.

Judge Hanscom also rejected the argument of the intervenors and the Antitrust Division that the failing newspaper test should be based on the test for qualification under the Bank Merger Act, as articulated by the Supreme Court in the *Third National Bank* case. In a long overdue analysis, he reviewed the relationship between the failing newspaper test and the standards set forth in the Bank Merger Act:

> There is nothing in the legislative history of the Newspaper Preservation Act as a whole to suggest that Congress intended that the standards used for judging bank mergers were to be applied to newspapers. The House Report contains no reference to the Bank Merger Act or to the Third National Bank case, and the Senate Report is, in fact, mistaken. There is no definition or discussion of the phrase "in probable danger of financial failure" in the Third National Bank case. Congress established certain standards for judging bank mergers in the Bank Merger Act, and established other standards for a joint operating arrangement in the Newspaper Preservation Act.
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> The fact that Congress legislated certain standards and modifications to antitrust doctrine in the two industries, banks and newspapers, provides no warrant for arguing that the stan-

129. *Id.* finding 158, at 84.
130. *Id.* at 88-89.

> dards are the same, or that some of them are the same. This is obvious from the terms of the respective Acts. For example, the Bank Merger Act directs the weighing of potential anticompetitive effects of a bank merger against its probable effect in meeting the convenience and needs of the community to be served. 390 U.S. at 177. The Newspaper Preservation Act is quite different, providing that a newspaper in probable danger of financial failure can enter a joint operating arrangement with a profitable paper if the arrangement will preserve the failing paper as an independent editorial voice. The Bank Merger Act directs the agencies and the courts to consider managerial as well as financial resources in weighing a proposed merger. 390 U.S. at 190. The Newspaper Preservation Act directs consideration of a newspaper's financial condition but makes no mention of its managerial resources. There is nothing in the legislative history to suggest that Congress intended to require the owner of a failing newspaper to sell it to others who then might enter a joint operating arrangement as permitted by the Act.[131]

With respect to the incremental analysis argument advanced by the Antitrust Division and the intervenors, Judge Hanscom took the same position as had Judge Moore in *Cincinnati*, holding that the incremental analysis approach contravenes the phrase "regardless of its ownership or affiliations."[132]

In an opinion dated June 15, 1982, Attorney General William French Smith adopted all of Judge Hanscom's findings and conclusions "with the exception of that portion of Finding 158 which provides that the P-I could be sold 'to a person or firm who could, and would, continue it in operation as an independent metropolitan daily.' "[133] He concluded by saying, "I cannot find evidentiary support for such a finding in the record upon which my decision must be based,"[134] and by stating that this was a "fairly speculative conclusion [that was] simply without evidentiary support."[135] The Attorney General did note, however, that evidence of purchase offers or negotiations might be

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131. *Id.* at 91-92.

132. *Id.* at 98.

133. Opinion and Order of the Attorney General *in re* Application of Seattle Times Co., Order No. 979-82, at 5 (June 15, 1982).

134. *Id.*

135. *Id.* at 11 n.*.

pertinent in assessing the financial condition and prospects of the allegedly failing newspaper.[136]

c. The district court's opinion. The day after the Attorney General issued his opinion and order, the intervenors commenced a federal district court action challenging the decision.[137] A few days later, District Court Judge Barbara J. Rothstein issued an order postponing the effective date of the Attorney General's order for two months[138] and proceeded to entertain cross motions for summary judgment. On August 27, 1982, the afternoon of the last day of the postponement, Judge Rothstein granted the plaintiffs' motion for summary judgment, holding that the Attorney General's order was "contrary to law and therefore invalid."[139]

In reaching her conclusion, Judge Rothstein began with the proposition that "statutory exemptions to the antitrust laws . . . are to be narrowly construed." She then proceeded to address the prospective buyer issue. Noting that Judge Hanscom had found that the *P-I* had not been offered for sale despite serious inquiries from potential buyers,[140] Judge Rothstein found it arbitrary and capricious for the Attorney General to reject the portion of finding of fact 158 that concluded that the *P-I* "could in all probability be sold at fair market value to a person or firm who could, and would, continue it in operation as an independent metropolitan daily." Adopting Judge Moore's derivation of the failing newspaper test from the standard for judging bank mergers under the Bank Merger Act, she cited the following language from *Third National Bank:* "The applicants for the merger must 'reliably establish the unavailability of alternative solutions.' "[141] She then determined that a sale to a willing, noncompeting buyer would have constituted an "available alternative." While agreeing with Judge Moore that consideration of

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136. *Id.*

137. Committee for an Indep. P-I v. Smith, 549 F. Supp. 985 (W.D. Wash. 1982).

138. Time is crucial in the formation of any merger, particularly a JOA, in which creative and emotional factors often lie in fragile equipoise with considerations of economic survival. *See* Note, *Seattle Application*, *supra* note 23, at 685-86; *see also* S. OPPENHEIM & C. SHIELDS, *supra* note 7, § 52 (a newspaper in the downward spiral must be rescued quickly). The publishers could not have suspected that it would be over seven months before the Attorney General's Opinion of June 15, 1982, would be law.

139. 549 F. Supp. at 996.

140. *Id.* at 990.

141. *Id.* at 992 (quoting United States v. Third National Bank, 390 U.S. 171, 190 (1968)).

noncompeting purchasers was not an absolute prerequisite to the approval of a JOA, Judge Rothstein went on to hold that "[i]f an alternative solution might be the sale of the newspaper to someone else, that alternative must have been explored before approval may properly be granted."[142]

Noting that Judge Moore had recommended approval of the *Cincinnati* application "because the evidence did not support a conclusion that there was another party ready, willing, and able to purchase the Post and to improve its operating results so as to permit its preservation as an independent daily,"[143] Judge Rothstein cited Judge Hanscom's findings in *Seattle* to support her conclusion that there were ready and willing buyers and that the *P-I* had not met the burden of proving that some such buyer would not have been able to resuscitate the *P-I*.[144] With this single exception, Judge Rothstein left all other findings of the Attorney General undisturbed.

The Hearst Corporation and the Seattle Times Company proceeded to file an emergency motion with the Ninth Circuit. The court granted an expedited appeal, and the case was argued

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142. *Id.* at 993 (quoting *Cincinnati*, *supra* note 81, at 126-27).

143. 549 F. Supp. at 993.

144. Judge Rothstein's exact words were as follows:

> Where the record establishes that there are competent businessmen ready and willing to tackle the management problems of the P-I, the burden of proof rests upon the applicants for the JOA to demonstrate that the new owners could not make the P-I succeed. 28 C.F.R. Section 48.10(a)(4). There has been no fair opportunity for prospective buyers to prepare and present their plans to make the P-I profitable. The court wishes to make clear that it does not disagree with the ALJ that Hearst is not obligated to seek out buyers. Nevertheless, where there are ready and willing buyers who present themselves, if Hearst wishes to obtain the benefits of the JOA, it must carry the burden of demonstrating that none of those buyers could continue to operate the P-I as an independent daily.
>
> In short, in order for the P-I to qualify as a "failing newspaper" for purposes of a JOA, defendants must show that no other viable alternatives exist for maintaining the newspaper's independent editorial voice.

Id.

If the test is financial soundness and the theory is that the existence of a ready buyer is circumstantial evidence of financial soundness, why draw the line at refusing prospective buyers' phone calls? Why not require the newspaper to tactfully solicit interests, especially if it is posited that reasonable alternatives must be explored? A practical answer is that rumors of amenability to a sale can seriously damage the morale of a newspaper. The conceptual answer has two parts. First, Congress never intended to force owners to sell; indeed, Congress created the NPA to help preserve the current owners' independent editorial voices. Second, Congress realized that the downward spiral is essentially irreversible and that changing owners will only delay the inevitable loss of the paper.

on December 17, 1982. On April 21, 1983, the court issued its opinion reversing Judge Rothstein.

d. The Ninth Circuit's opinion. The Ninth Circuit saw the case as presenting four substantive issues for decision:

> First, what role, if any, is proof of interested third-party purchasers to play in the determination that a newspaper is in probable danger of financial failure? Second, must it be shown that the failing newspaper would probably close if the proposed joint operating agreement is not allowed? Third, must the Attorney General determine that the proposed JOA is not unnecessarily anticompetitive and that it would not impair the editorial voices of smaller newspapers in the affected market? Fourth, is the Newspaper Preservation Act unconstitutional under the first amendment?[145]

The court first addressed the prospective buyer issue. It held that, while "alternatives to a JOA are relevant to the determination that a newspaper qualifies under the Act[,] . . . Hearst met its burden of showing that the alleged alternatives did not offer a solution to the P-I's difficulties."[146] The court agreed with the Attorney General that the evidence did not require him to adopt finding of fact 158, pointing out that the evidence disclosed nothing more than a series of inquiries, not offers, from prospective buyers. The court went on to hold, however, that the analysis did not end there. In view of the undisputed evidence that Hearst did not cultivate inquiries regarding the sale of the *P-I*, the question of the availability of reasonable alternatives required further scrutiny. Although the Ninth Circuit apparently rejected the district court's holding that Hearst could not meet its burden of proof without at least pursuing sale of the *P-I* to any buyer who presented himself, the Ninth Circuit held that the existence of interested purchasers was relevant to the question of the availability of reasonable alternatives.

While the Ninth Circuit did not adopt Judge Moore's *Cincinnati* analysis in its entirety, the court was favorably disposed to his analysis of the failing newspaper standard.[147] The Ninth Circuit agreed with Judge Moore "that Congress intended the Supreme Court's interpretation of the Bank Merger Act in

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145. Committee for an Indep. P-I v. Hearst Corp., 704 F.2d 467, 471 (9th Cir.), *cert. denied*, 104 S. Ct. 236 (1983).

146. *Id.* at 475.

147. *Id.* at 477.

Third National Bank to be applicable to newspaper JOA's."[148] The Ninth Circuit then set forth the following test: "The pertinence of interested purchasers, as the Attorney General apparently concedes, may require a JOA applicant to prove that the 'new ownership and management could not convert the [paper] into a profitable enterprise without resort to a joint operating arrangement.' "[149] The court grounded its adoption of this test on the justification that it would

> prevent newspapers from allowing or encouraging financial difficulties in the hope of reaping long-term financial gains through a JOA. A JOA applicant should not be allowed to engage in poor business practices or maintain inept personnel in anticipation that it may later qualify for an antitrust exemption in the future.[150]

Thus, although it disagreed with Judge Rothstein's factual determination that the record was insufficient to support the Attorney General's order, the Ninth Circuit had charted a legal course closer to the test proposed by Judge Rothstein than that proposed by Judge Moore. The moment that scholars and newspaper owners had awaited for twelve years—an appellate court's exposition of the NPA's meaning to prospective JOAs—had arrived, only to reveal that *Citizen Publishing* was alive again, if not entirely well.

In reversing the district court, the court found that the record contained substantial evidence to support Judge Hanscom's finding that new management would not be any more successful than Hearst had been in returning the *P-I* to profitability. The Ninth Circuit also pointed out that Judge Rothstein had misperceived the proper scope of the burden of proof under the Act. While the ultimate burden of persuasion indeed lay with the applicants, that burden was satisfied by a showing of "(1) the economic fact of probable failure (downward spiral, irreversible losses), and (2) reasonable management practices."[151] The burden of going forward, continued the court, was then shifted to opponents of the application to demonstrate that the losses were the result of unreasonable management practices or that, through proof of available alternatives, the paper was not actu-

148. *Id.* at 476.
149. *Id.* at 478 (quoting *Cincinnati*, *supra* note 81, at 127).
150. 704 F.2d at 478.
151. *Id.* at 479.

ally in probable danger of failure.[152] But because the applicants had proved that the paper had been reasonably managed and that "its trend toward failure [was] irreversible *under any management*," the Ninth Circuit had no difficulty concluding that the applicants had met their burden of proof.[153]

The Ninth Circuit then proceeded to deal with the other three substantive issues. First, it held that although an applicant must show that closure was probable in order to satisfy the failing newspaper standard, this test must be applied in light of the phrase "regardless of its ownership or affiliations." Accordingly, if the *P-I* would probably have been closed but for the ownership of Hearst, the applicants had met their burden.[154] The Ninth Circuit also flatly rejected the incremental analysis approach as had every previous tribunal to consider the question. Second, in response to plaintiffs' argument that the Seattle joint operating arrangement would harm competing suburban newspapers, the court stated that Congress had recognized that approval of joint operating arrangements could have anticompetitive ramifications, but that "[t]his was a national policy choice Congress was free to make."[155] Finally, the Ninth Circuit rejected the constitutional attacks on the Act, following the lead of the Seattle District Court and a second district court.[156]

e. Analysis. In requiring prospective JOA applicants to demonstrate that the adoption of alternative approaches to managing and operating the weaker newspaper would not solve its financial problems, the Ninth Circuit aligned itself with Judge Moore, Judge Hanscom, Judge Rothstein, and probably Congress as well. But the Ninth Circuit did not stop there. It also ruled that when interested purchasers appear and present plans purporting to show how new owners could make the failing newspaper profitable, the failing newspaper must prove that

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152. *Id.*

153. *Id.* The Ninth Circuit compared this situation to the *Third National Bank* case as follows: "[W]here proof adduced at trial showed [that the] 'failing' bank's problems were due to mismanagement, [the] bank had [the] burden of showing reasonable attempts to solve management difficulties were made, or that they would be unlikely to succeed." *Id.* As is discussed in more detail below, it was not claimed in *Third National Bank* that Nashville Bank and Trust was failing. Accordingly, the test articulated by the Supreme Court was unrelated to the "probable failure" language of the Bank Merger Act.

154. The finding of Judge Hanscom to this effect was approved. *Id.* at 480-81.

155. *Id.* at 482.

156. Bay Guardian Co. v. Chronicle Publishing Co., 344 F. Supp. 1155 (N.D. Cal. 1972); *accord* Heheman v. Bell, 1978-1 Trade Cases ¶ 61,975 (S.D. Ohio 1978).

"new ownership and management could not convert the [paper] into a profitable enterprise."[157] By so ruling, the court grafted onto the Act a test which was neither contemplated by Congress nor required by the Bank Merger Act and which has the potential for creating extremely troublesome practical problems.

If, for example, Rupert Murdoch had not simply expressed an interest in being considered as a buyer in the event the Seattle JOA was not approved[158] but had appeared at the hearing with a specific plan for transforming the *P-I* into a tabloid daily that he claimed would be profitable, what would the result have been? If we further assume that the newspapers had failed to prove that the Murdoch plan would not succeed, the Ninth Circuit's test would have required that the Seattle application be denied. But what would have happened then? Because Hearst would presumably have been unwilling to transform its serious, award-winning newspaper into a tabloid blaring headlines such as "MOTHER BOILS BABY—EATS IT"[159] (and because the Ninth Circuit does not purport to require it to do so[160]), would Hearst have been required to choose between letting the *P-I* continue in the downward spiral on the one hand and selling to Mr. Murdoch on the other? Furthermore, if Hearst had been required to sell, who would have set the price? If the JOA application had been rejected, Hearst would have lost all bargaining leverage and would have been forced to sell at fire-sale prices. Nothing in this scenario provides hope that either the preservation of editorial independence or the public interest would be served.

Further practical difficulties attend adoption of the Ninth Circuit's analysis. If the court's articulation of the prospective purchaser test is followed, hearings on future applications will be expensive, time-consuming, and counterproductive.[161] Pro-

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157. 704 F.2d at 478 (quoting *Cincinnati*, *supra* note 81, at 127).

158. 704 F.2d at 475 n.5.

159. *See An Analysis Of The Nation's Leading Newspaper Analysis*, AD WEEK, Apr. 26, 1982, at 44.

160. The Ninth Circuit denied that "a newspaper must explore the alternative of changing its editorial policies prior to entering a JOA." 704 F.2d at 478 n.8.

161. A newspaper applying for exemption under the NPA is likely to be suffering substantial losses. In the case of the *Seattle Times* application, for instance, by the time the JOA was finally allowed to go into effect, the *P-I*'s loss rate had reached $500,000 a month. Telephone interview with John Morton, Washington, D.C. security analyst specializing in newspaper properties with the securities firm of Lynch, Jones, and Ryan (Oct. 5, 1983).

spective purchasers, seeing an opportunity to acquire a newspaper publication at a bargain price, can be expected to intervene, to propose elaborate plans for turning around the failing newspaper, and to impose on the applicants the extremely heavy burden of proving that the proposals would not be successful. Such "interested noncompeting buyers" can hardly be expected to be objective. Thus, the door would be opened for administrative judges and courts to be misled and confused by prospective purchasers' representations regarding new business disciplines, maintenance of editorial policies, and other management practices.

The Ninth Circuit's standard also contains some analytical deficiencies. For example, nothing in the NPA justifies adopting a construction of the failing newspaper test which would force the applicant publication to choose among conversion to a tabloid format, sale at a bargain price, and closure. A fair reading of the legislative history shows that Congress intended to preserve the editorial voices of the applicant newspapers, not the editorial voice of some prospective buyer looking for a bargain.[162] While evidence of alternative management practices that might enable the applicant newspaper to improve its performance would be relevant, evidence of what some prospective purchaser would do if it were permitted to take over is irrelevant and should not be admissible.

Like Judge Moore and Judge Rothstein, the Ninth Circuit misread the Bank Merger Act and the *Third National Bank* case and thereby accorded an unjustified significance to the proposals of prospective purchasers. A close reading of the Bank Merger Act and *Third National Bank* compels the conclusion that comparisons with NPA standards are wholly unwarranted and that Judge Hanscom's analysis of the "prospective buyer issue"[163] should be adopted to eliminate the problems raised by the Ninth Circuit test. As Judge Hanscom pointed out, the fact that Congress provided for exemptions to the antitrust laws in two different industries does not imply that the same test should be applied in judging qualification for exemption, particularly when neither the industries nor the standards articulated in the Acts bear the slightest resemblance to each other. While it is

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162. The Ninth Circuit seems to agree, in apparent contradiction to the test it has articulated. *See* 704 F.2d at 478 n.8.

163. *See supra* note 131 and accompanying text.

true that the Bank Merger Act employs the phrase "probable failure," that phrase is contained only in provisions permitting the agency to dispense with certain notice and waiting period requirements if the agency finds that it must act immediately to prevent the probable failure of one of the banks involved. The actual standard for testing bank mergers provides:

> The responsible agency shall not approve—
>
> (A) any proposed merger transaction which would result in a monopoly, or which would be in furtherance of any combination or conspiracy to monopolize or to attempt to monopolize the business of banking in any part of the United States, or
>
> (B) any other proposed merger transaction whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.
>
> In every case, the responsible agency shall take into consideration the financial and managerial resources and future prospects of the existing and proposed institutions, and the convenience and needs of the community to be served.[164]

The fact that the "probable failure" language is not part of the standard for testing bank mergers may account for the absence of such language in *Third National Bank*. In that case the Supreme Court merely discussed new ownership or management in the context of searching for alternatives to merger when one of the banks—one that was never suggested to be "failing"—was not "meeting the convenience and needs of the community to be served"[165] because of outmoded and unimaginative approaches to management.[166] Thus, contrary to the comments of several senators and the conclusions of Judge Moore, Judge Rothstein, and the Ninth Circuit, the "probable failure" language was not taken from the Bank Merger Act and had not been the subject of a Supreme Court opinion.

The dissimilarity in the tests set forth in the two acts is

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164. 12 U.S.C. § 1828(c)(5) (1982).
165. *Id.*
166. United States v. Third Nat'l Bank, 390 U.S. 171, 174, 176-77 (1968).

consistent with the differing objectives sought. The Bank Merger Act requires a balancing of anticompetitive effects against the needs of the community on an ad hoc basis. One of the banks need not be failing in order for the merger to be approved if other circumstances warrant approval. By contrast, the NPA neither requires nor permits such a balancing test. When it passed the NPA, Congress had already balanced the consequences of eliminating commercial competition against the benefits the public would derive from editorial diversity and had decided that preservation of independent editorial voices should take precedence over the antitrust laws. In addition, merger under the Bank Merger Act consolidates the management policies of two banks into a single bank (constituting a complete merger that justifies a tougher test), while the objective of the NPA is to permit only partial merger in order to preserve editorial and reportorial diversity.

Thus, while the Ninth Circuit arrived at the correct outcome in rejecting the attack on the Seattle application, its articulation of the standard for reviewing prospective JOA applications could impose an unjustified burden on future applicants and has created the potential for serious practical problems—precisely the result Congress tried to avoid.

III. The Future of the NPA

A. The Original Twenty-Two: Stability at Last?

In passing the NPA, Congress was motivated to preserve competing editorial voices in an industry in which competition was slowly dying. Congress acted by granting a limited immunity to the twenty-two preexisting JOAs. This immunity was to be a conditional shield against antitrust attacks on arrangements that had been entered into in a belief that they were lawful and that had operated without challenge from the Justice Department for very long periods of time. Because of the nature of the political process, however, the NPA is not as clear as it should have been, and the need for compromise blurred its language and intent. But whether or not an absolute grandfathering of the original twenty-two was intended, none of the proponents of the Act—and probably very few of its opponents—intended or contemplated that in 1984 the original twenty two JOAs covered by section 1803(a) would still be vulnerable to attack.

In the absence of a court of appeals opinion or a definitive

pronouncement by the Supreme Court, the proper construction of the test for pre-Act JOAs under section 1803(a) is still in doubt, as is the resolution of the statute of limitations issue. If either the good faith test adopted by Judge Curtis in *Honolulu* or his analysis of the statute of limitations issue is followed by other courts, the original twenty-two JOAs will probably achieve at last the stability Congress intended.[167] In any event, in view of the costly failures of the plaintiffs in both *Pacific Sun* and *Honolulu*, even well-financed plaintiffs will think twice before mounting further challenges under section 1803(a).[168]

B. Prospective JOAs: An Unwarranted Burden

The Ninth Circuit has unwittingly and regrettably charted a road map for effective opposition to prospective JOAs that future intervenors will be unable to resist. As a result, applicants for approval of prospective JOAs under section 1803(b) can expect an expensive, time-consuming, and bitterly contested process, in which they will be forced to prove the unfeasibility of plans for achieving economic success submitted by prospective purchasers who have obvious ulterior motives. So long as a reviewing body, whether it be the Attorney General, a district court, or a higher court, considers the objective of the NPA to be the maintenance of any two newspapers rather than the preservation of the existing diverse editorial voices of the applicant newspapers, future applicants under section 1803(b) will have a difficult time.

Although the NPA has been generally as effective as Congress intended it to be, the electronic and telecommunication revolution of the 1980s is going to place new stresses on the struggling newspaper industry. These difficulties can be overcome only if the courts and the Antitrust Division accept the resolution of the competing interests of antitrust enforcement and newspaper preservation already made by Congress.

It is time the courts and the Antitrust Division recognize

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167. The authors believe that Congress did not intend to require proof of "good faith," but only that the newspaper was not likely to remain or become financially sound.

168. As a practical matter, the cost of prosecuting a challenge to a JOA and the probable lack of success will deter [illegible] from taking on future challenger's cases on a contingent fee basis. It is also doubtful that any plaintiff would have either the interest or resources to challenge an existing JOA. Enforcement of the NPA with respect to the 22 preexisting JOAs will thus likely be left where Congress intended it—with the Attorney General.

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that Congress can carve out exceptions to its own statutes, because statutes are, after all, only statutes.

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by Walter E. Niebauer Jr.

Effects of the Newspaper Preservation Act on the Suburban Press

Matching metropolitan newspapers across time indicates joint-operating agreements haven't damaged suburban press's health.

Perhaps no piece of legislation affecting the newspaper industry stirred more controversy during its hearings than the Newspaper Preservation Act (NPA) of 1970. The controversy developed because several daily newspaper publishers sought NPA to obtain a rare privilege of antitrust exemption from the U.S. Congress.[1]

Under the NPA's provisions, daily newspapers competing in the same community are allowed, in certain circumstances, to merge their bookkeeping, production, circulation and advertising functions, while keeping their editorial functions separate, in what is termed a joint-operating agreement.[2]

In contrast to open competition between two dailies in one community, NPA allows for a joint-operating agreement based on the financial condition of the weaker of the two papers.

If one of the papers in a two-paper market can demonstrate that it is "failing" financially, it may combine with its financially healthier competitor to improve its chances for survival.[3]

In a joint-operating agreement, the failing newspaper may benefit in two ways. First, it may reduce expenses by sharing facilities, systems and personnel with its rival. Second, it may increase its revenues by becoming the advertising partner of its competitor.

In the partnership, advertising is sold for both newspapers simultaneously at a lower rate than if the two papers were sold separately. By "sharing" with its competitor, the low additional cost for the second-place paper should result in more advertising content than it was able to attract as an independent.

Also, revenues acquired through sales under the combined advertising rates are shared by the papers on a percentage basis, usually tied to their respective circulation figures.

By allowing such practices, while keeping editorial departments separate, the Act intended to "maintain a

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newspaper press editorially and reportorially independent and competitive."[4]

The NPA followed closely on the heels of a U.S. Supreme Court ruling against a joint-operating agreement in Tucson, Ariz.[5] The ruling spurred action by representatives of 42 daily newspapers in 21 other joint agreements which were in danger of similar antitrust action.[6]

The result was resumption of hearings on legislation which had died a year earlier in committee and had failed to become what was then called the Failing Newspaper Act.[7]

The key point of contention in both series of hearings involved the relationship among circulation, advertising revenue and survival.

Proponents of NPA argued that without joint-operating agreements, daily newspapers which fall too far behind their competitors in circulation would fail because of lost advertising.[8]

Bogart has noted that an advertiser is likely to abandon a daily newspaper which is trailing in circulation if the leading paper is able to deliver 60% of the advertiser's target audience.[9] In circulation figures, a gap of 30,000 to 50,000 between large, metropolitan dailies "can cause a vortex of advertising flow to the leading paper."[10]

Representatives from the newspapers which had already entered into joint agreements argued that, under such circumstances, a joint-operating agreement was in the public interest since it would help preserve one of the major media voices in the community.[11]

Suburban newspaper publishers, legal observers and other opponents of the legislation countered that the economic advantages of joint-operating agreements enabled the joined dailies to so dominate a market that it was difficult for other newspapers to become established and compete for readers and advertisers.

They said allowing such agreements to continue, much less to provide the opportunity for other metropolitan dailies to join was contrary to the Act's expressed purpose of promoting an independent and competitive press.[12]

One of the leaders in the fight against the Act was Stuart R. Paddock Jr., publisher of ten daily and six weekly suburban Chicago newspapers. He claimed that the actual purpose of the Act was to help metropolitan dailies maintain a competitive advantage over the increasingly strong suburban press.

He stated: "If newspapers are to continue to play a viable, vital role in American society, they must prove their worth in the open market place."[13]

Excepting the original 22 joint operating agreements which were retroactively sanctioned by the NPA, only four applications have been filed under the Act.[14] The first joined two Anchorage, Alaska, dailies in 1975, but the arrangement was dissolved a few years later and the papers are again totally independent.[15]

The other applications have been made so recently that it is too early to determine the effects of the NPA on newspapers joined since its passage.

For the original 22 joint agreements, however, the NPA appears to have been a success. The failing newspapers in all 22 of the joint arrangements have been "preserved" and continue to publish and in

many cases flourish.[16] More importantly, 12 of the original 22 failing papers are afternoon dailies, a group much harder hit by recent newspaper failures than morning dailies.[17]

Without joint-operating agreements, the combination of being second best in a two-paper circulation race, and circulating in the afternoon, would undoubtedly have resulted in the demise of at least some of these papers.

While the NPA appears to have had the desired effect in preserving at least some of the nation's financially floundering metropolitan dailies, what have been its effects on the other newspaper media in the affected communities? More specifically, has the presence of daily newspapers operating under joint agreements prevented suburban newspapers from becoming established and building circulation as opponents of the Act feared?

With these research questions in mind, two hypotheses were tested. The first was: there are fewer suburban newspapers in areas where two metropolitan daily newspapers have entered into a joint-operating agreement than in areas where two metropolitan daily newspapers are independent and competing.

The second hypothesis was: suburban newspapers in areas where two metropolitan daily newspapers have entered into a joint-operating agreement have lower circulation than do suburban newspapers where two metropolitan daily newspapers are independent and competing.

Methodology

Definitions. Suburb—an area, primarily of residences, having its own government, name identity and defineable political boundaries, located outside but contiguous to the political boundaries of a central city of at least 50,000 population, and with no intervening rural areas.

This is essentially the U.S. Bureau of Management and Budget's definition of a Standard Metropolitan Statistical Area (SMSA), but with the central city removed.[18]

The major departure from the SMSA definitions is the stipulation that a suburb must be contiguous to the central city, eliminating communities not greatly influenced by the central city because of their geographical detachment from it.

Suburban newspaper—is a paid, free or controlled distribution news publication which is issued at fixed, regular intervals but not less than weekly, contains a minimum of 25% editorial material[19] and circulates primarily in a suburb or suburbs.[20] In all cases in this study, suburban newspapers could be identified by their suburban publishing location, or a name which included their suburban circulation area.

Metropolitan area—is the combined total of the central city and its surrounding suburbs. Before suburbs came into being, a metropolitan area was equivalent to the present day central city. In this discussion metropolitan area refers to both pre-suburban cities and the combined present day central city with its surrounding suburbs.

Matching procedure. This investigation involved isolating two populations of suburbs with similar community characteristics, one population from metropolitan areas having joint-operating agreements, the other from metropolitan areas

having two independent, competing, metropolitan daily newspapers.

The hypotheses were then tested by comparing the mean number and mean circulation of newspapers in a random sample of suburbs drawn from each of the two populations.

Assuming suburbs from similar metropolitan areas will also be similar, the first step was to match as many of the 22 areas having joint-operating agreements as possible each with one of the 21 areas having competing dailies.[21]

The matching procedure was conducted at two points as a method to control, over time, variables which might have obscured the effects of the joint agreements.

The first matching was to determine which pairs of metropolitan areas were similar before the joint-operating agreements could have affected the suburban newspapers: whether the joint agreement took effect before or after World War II.

Metropolitan areas where the newspapers joined before WW II were matched with data from 1950. The choice of 1950 takes into account that joint agreements could not have had any appreciable effect on the suburban press before the war because suburbs did not begin to appear to any significant extent until after the war.[22]

The specific year chosen was a compromise between a time during which immediate post-war conditions might make matching misleading and a time before major suburban growth occurred.

For metropolitan areas in which newspapers did not enter into joint agreements until after 1950, the first matching point was five years before the agreement took effect. The lead time recognizes that the closer to the agreement the matching occurred, the less the two papers were competing, since one of the papers should have been considerably weaker than the other. The best match should take place before the one newspaper weakened appreciably, and the five-year lead time takes this into consideration.

The pairs of metropolitan areas which survived the first matching were subjected to a second matching using the most recently available 1983 data. The second matching eliminated any pairs which exhibited relative changes over time to indicate inadequate control of the variables.

Variables. The variables used in the matching procedure were selected to reflect basic characteristics of a metropolitan area's potential newspaper market. The first four variables represent factors extrinsic to the joint agreements but which might affect the number and circulation of suburban newspapers if they were not controlled over time.

Income per capita was used as a control for the strong correlation which has been found between high income and high newspaper readership.[23] Income per capita for each metropolitan area was obtained from the *Editor & Publisher Market Guide.*[24]

Number of households served as a control variable for potential newspaper circulation in the paired metropolitan areas. Since generally only one copy of a given newspaper is purchased per household, number of households should approximate potential circulation.

The number of households in each metropoitan area was obtained from the *Editor & Publisher Market*

Guide by combining data for the city zone (CZ), the area within the central city's limits, and the retail trade zone (RTZ), the area outside the CZ but within the central city's sphere of sales influence.

The RTZs provided a convenient source of variable data, at least for the SMSAs in this study, because they closely approximated the areas covered by the suburbs.[25]

Population was used as a supplement to the number of households to control for the number of individuals per household, because differences in household size could indicate potential differences in the newspaper consumption in paired metropolitan areas. Population was obtained by combining data for the CZ and the RTZ.

Retail sales was employed as a variable to provide a degree of control for the advertising potentials in the paired metropolitan areas. To a certain extent, the level of retail sales in an area determines the funds available to retail businesses for newspaper advertising.

In addition to the four variables controlled over time, a fifth variable, metropolitan daily newspaper circulation, was employed only in the first matching.

Circulation was considered important, at the first matching point, to pair the metropolitan areas according to their relative size, and therefore the supposed strength of the metropolitan dailies in the two areas. Their circulation size could be expected to affect the ability of suburban newspapers to compete later in those areas.

Metropolitan daily newspaper circulation was not included in the second matching because, if the presence of a joint-operating agreement were to affect suburban newspaper numbers and circulation, it was also reasonable to expect that there would be a coincident effect on the metropolitan dailies.

Therefore, although no expectations were posed, metropolitan daily circulation was ultimately treated as a dependent variable in the results to compare daily circulation and as a component to compare total metropolitan area circulation.

Circulation data for metropolitan daily newspaper circulation were obtained from *Editor & Publisher International Yearbook*.[26]

Most research involving matching metropolitan areas or newspapers has relied on the subjective method of inspection to determine the similarity of data representing the two entities.[27] Since matching the metropolitan area as closely as possible was considered critical, this study added an objective method to determine the degree of similarity.

The procedure involved comparing the metropolitan areas by means of simple correlations in a manner similar to that employed by Wilcox.[28] Unlike Wilcox's raw data procedure, however, the metropolitan area variable data were converted to standardized (Z) scores before the correlations were computed.[29]

Z scores, with a mean of zero and a standard deviation of one, are useful in a matching procedure for two reasons. First, they facilitate matching by inspection.[30] Second, they prevent misleadingly high values which may result when the computation of correlations include very large numbers.

A correlation of r=.90 at both matching points was made the minimum for the metropolitan areas

TABLE 3: Average Time per Week Assertives and Unassertives Spend Reading Newspapers

Type of Newspaper	Minutes Spent by Assertives (N=106)	Minutes Spent by Unassertives (N=93)
General Single Newspaper Reading (No specifics given)	7.3	10.3
Big City Daily	68.1	70.3
Small City Daily	58.3	67.1
Local Weekly	6.7	6.5
Sunday Newspaper	26.9	17.7
Other National/ International	1.7	2.6
Religious	1.1	1.3
Total Time per Week Spent Reading Newspapers	170.1	175.8

Note: Figures in the table were obtained from actual daily entries over the seven-day period. T tests indicated no significant differences, at $p < .10$, one-tailed.

assertive women spent a little less time — about 6 minutes less — each week on newspapers than did unassertive women.

Only with Sunday newspapers did assertive women appear to spend more time than unassertive women, but the difference did not reach significance at $p < .10$. Assertives averaged about 2 hours 50 minutes of reading time each week; unassertives, 2 hours 56 minutes.

While they spent less time on newspaper reading, assertive women reported regularly reading a slightly greater *number* of newspapers than unassertive women reported. Although differences between the two groups are not statistically significant, assertives averaged 2.06 newspapers regularly read while the unassertives averaged 1.86.

This finding is in accord with the results reported by the authors for magazine readership: assertives regularly read 4.32 magazines; unassertives, 3.84.[31]

Reading style. The fact that assertive women regularly read more newspapers in less time than did the unassertive respondents buttresses the hypothesis that assertive women are more likely to skim rather than carefully read newspapers.

Slightly more assertives than unassertives (30% vs. 25%) said they primarily skim the newspaper; and slightly more unassertives than assertives (59% vs. 51%) said they primarily read parts carefully.

More assertives than unassertives (14% vs. 11%) reported doing both. However, these differences are not statistically significant, and education controls did not change the findings.

In light of the time data and the responses regarding numbers of newspapers regularly read, we had expected significant differences between assertives and unassertives in reading style. The lack of significance here may, in fact, reflect problems in questionnaire design rather than a genuine lack of difference.

A two-option question — do you usually skim or read some parts carefully — was undoubtedly confusing to many respondents, as indicated by the relatively large number who provided a third response stating they do both. In other words, even the most extreme skimmers no doubt read some parts carefully at times and might not know which behavior the question would want them to focus on.

The word "skim," moreover, denotes superficial reading and may have put off respondents who wanted to avoid the label of reading nothing carefully. A better constructed question — one designed to tap varying degrees and combinations of skimming and careful reading — may have demonstrated more dramatic differences than actually appeared.

Conclusions

Female media consumers in the past generally have been segmented on the basis of traditional demographic information: employment status, socioeconomic status, residency, age, stage in life cycle. Bartos introduced the notion of a woman's view of her job into the analysis of female populations.[32]

While a useful advance over purely demographic measures, Bartos' variable has limitations. Social and economic exigencies are rapidly changing women's attitudes toward employment and their work goals.

The "openness-to-experience" assertiveness correlation is a behavioral variable less vulnerable to the influence of extrinsic economic factors. It is also a variable that could be examined in a broader range of populations, e.g., retired persons, teenagers who have not developed career goals.

The current study suggests that employed women's assertiveness is a predictor of the categories of content these women read.

Assertive employed women are more interested in news, especially national news, than are unassertives. Unassertives, on the other hand, appear slightly more interested in information that relates to the home and family, e.g., local statistics and women's sections.

Although the assertives' preference for skim reading was not

significantly greater than that of non-assertives, reading style merits more careful study. Assertives' tendency to read more newspapers in less time and to claim to skim read newspapers more frequently rather than to read them carefully is consistent with the data obtained in the earlier study of assertives' use of magazines.

The quick scanning style facilitates faster access to that which is new and would logically accompany an attitude of "openness to experience." Further study of this variable is needed.

Notes

1. Sex differences in political preference were revealed in the Harris Survey, July 1981, reported in Ruth B. Mandel, "How Women Vote: the New Gender Gap." *Working Woman*, 7: 128-131 (September, 1982).
2. Mandel, *op. cit.* See also Bella Abzug and Mim Kelber, "How to Win with the Gender Gap: 3 Scenarios for the '84 Election," *Ms.*, 12:39-42, 92 (March, 1984).
3. Abzug and Kelber, *ibid.*
4. Quoted in Mandel, *op. cit.*
5. Everett C. Ladd, "Private Opinion: Does Reagan Have a Problem with Women?" *Public Opinion*, 4:48 (December, January, 1982).
6. Abzug and Kelber, *op. cit.*
7. Dorothy Jurney and Catherine East, editors, *New Directons for News*. Washington, D.C.: Women's Studies Program and Policy Center, George Washington University, September, 1983.
8. Margaret Andreasen and H. Leslie Steeves, "Employed Women's Assertiveness and Openness as Shown in Magazine Use," *Journalism Quarterly*, 60:449-457 (Autumn, 1983).
9. See Bruce H. Westley and Werner J. Severin, "A Profile of the Daily Newspaper Non-Reader," *Journalism Quarterly*, 41:45-50 (Winter, 1964); Jeanne Penrose, David H. Weaver, Richard R. Cole and Donald Lewis Shaw, "The Newspaper Non-Reader 10 Years Later: A Partial Replication of Welsey-Severin" *Journnalism Quarterly*, 51:631-38 (Winter, 1974) Eugene F. Shaw, "Newspaper Reading in Small Towns." *ANPA News Center Research Report*, 12:1-8 (June, 1978).
10. Jack M. McLeod and Sun Yoel Choe, "An Analysis of Five Factors Affecting Newspaper Circulation." *ANPA News Research Report*, 10:1-6, (March 14, 1978).
11. Rebecca C. Quarles and John P. Robinson, "Sex Role Differences in Newspaper Readership," paper presented to the Theory and Methodology Division, Association for Education in Journalism, Houston, Texas, August, 1979.
12. See Arlene K. Sosanie and George J. Szybillo, "Working Wives: Their General Television Viewing and Magazine Readership Behavior." *Journal of Advertising*, 7:5-13 (Spring, 1978); Susan P. Douglas, "Cross National Comparisons and Consumer Stereotypes: A Cross Study of Working and Non-Working Wives in the U.S. and France." *Journal of Consumer Research*, 3:12-20 (June, 1976); Susan P. Douglas, "Do Working Wives Read Different Magazines from Non-Working Wives?" *Journal of Advertising*, 6:40-43 (Winter, 1977); "Working Women and Non-Working Women." Axiom Market Research Bureau, 1975; "Working Women Reject Stereotyped Ad Roles." *Advertising Age*, 48:62 (February 14, 1977); "Working Women." *Market and Media Decisions*, 11:68-78 (March, 1976).
13. The 1978 Simmons market research survey is cited in "Women, Work and Markets in the 80s" National Advertising Bureau (1979); the 1977 National Advertising Bureau study is cited in "Women and Newspapers in the 1970s" Newspaper Readership Project, Newspaper Advertising Bureau, Inc. (November, 1979).
14. Edna F. Einsiedel and Heather A. Tully, "Newspaper Use by Working and Non-Working Women." *Newspaper Research Journal*, 2:69-76 (July, 1981).
15. Marianne Ferber, "Women in the Job Market," speech presented during Women's Week, Urbana, Il, Nov. 17, 1976.
16. Simmons Market Research Bureau study, 1978/1979, referred to in Newspaper Advertising Bureau, *op. cit.*
17. Einsiedel and Tully, *op. cit.*
18. "Why Virginia Miles Characterizes Marketers' Concepts of Working Women as 'Lip Service.'" *Market and Media Decisions*,

11:74 (March, 1976).

19. Rena Bartos, "What Every Marketer Should Know About Women." *Harvard Business Review*, 56:73-85 (May-June, 1978).

20. Margaret Andreasen and H. Leslie Steeves, *op. cit.*

21. Linda C. Wyrick, W. Doyle Gentry and W. Derek Shows, "Agression, Assertion and Openness to Experience: A Comparison of Men and Women." *Journal of Clinical Psychology*, 33:439-443 (April, 1977): Wyrick, Gentry and Show's research also confirmed earlier findings by Gentry and Kirwin associating social constriction with low verbal aggression. See W.D. Gentry and P.K. Kirwin, "Constriction, Aggression and Assertive Training." *Psychological Reports*, 30:297-298 (February, 1972). Also see Andreasen and Steeves, *op. cit.*, for a further explication of the assertiveness concept.

22. Andreasen and Steeves, *op. cit.*

23. For a more detailed description of the sampling procedures, cooperation and return rates and diary and questionnaire instruments see H. Leslie Steeves and Lloyd R. Bostian, *Diary Survey of Wisconsin and Illinois Employed Women*, Bulletin 41, Department of Agricultural Journalism, The University of Wisconsin-Extension, Madison, WI, 1980.

24. See, for example, H.D. Bates and S.F. Zimmerman, "Toward the Development of a Screening Scale for Assertive Training," *Psychological Reports*, 28:99-107 (February, 1971); A.H. Buss and A. Durkee, "An Inventory for Assessing Different Kinds of Hostility." *Journal of Consulting Psychology*, 21:343-48 (August, 1957); Gentry and Kirwin, *op cit.*

25. These four areas of discrimination (wages; advancement and development opportunities; benefits and work conditions; and dignified, respectful treatment) were identified as "areas of prime concern" by the National Commission on Working Women for a series of six Regional Dialogues held in various parts of the U.S. beginning in Seattle, Wash., May 6, 1978. (See "Welcome" remarks by Elizabeth Koontz, chair, National Commission on Working Women, in the program schedule for the Seattle Regional Dialogue.)

26. See Andreasen and Steeves, *op. cit.* for further detail.

27. See, for example, John P. Robinson, *How Americans Used Time in 1965* (Ann Arbor, Michigan: Institute for Social Research, University of Michigan, 1977) for a discussion of validity studies comparing various measures of activity time.

28. Selected demographic data are presented in Table 1, Andreasen and Steeves, *op. cit.*

29. Andreasen and Steeves, *op. cit.*

30. In addition, Andreasen and Steeves, *op. cit.*, found that in spite of the significant difference between assertives and unassertives in women's magazine reading patterns, about three-fourths of the assertive women in their sample reported reading traditional women's magazines. Thus it would appear that any hypothesis regarding this content category should take into account the traditional interests of assertive women as well as of unassertive women.

31. Andreasen and Steeves, *op. cit.*

32. Bartos, *op. cit.*

Senator HATCH. We appreciate the testimony that each of you have given. It has been an interesting hearing.

Mr. PICARD. Mr. Chairman, may I add just one thing. I bring this to your attention simply because I am an editor of the Newspaper Research Journal and am well acquainted with the article you are referring to.

It is my observation that in fact the Newspaper Preservation Act of 1970 has indeed had little effect on daily and weekly newspapers' competition to this point. However, the amendments that are proposed in their current form will change that situation dramatically. If this bill were to pass in its current form, it would change and outmode those articles completely by changing the competitive situation.

Senator HATCH. We feel that the language is probably all right, but we will be happy to review your suggestions. And we will be happy to look at any other suggestions you care to submit.

We will recess until further notice.

Thank you.

[Whereupon, at 11:53 a.m., the committee adjourned, subject to the call of the Chair.]

APPENDIX

The Oakland Press

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BRUCE H. McINTYRE
President and Publisher

June 4, 1986

Senator Strom Thurmond, Chairman
Committee on the Judiciary
Room 212, Dirksen Building
Washington, D.C. 20510

Dear Senator Thurmond:

We wish to comment as part of the hearing record on Senate Bill 2314, an amendment to the Newspaper Preservation Act of 1970. We do business in the Detroit metropolitan area, where the largest newspaper joint operating agreement ever undertaken is now seeking federal approval.

Clearly if this JOA is approved its monopoly powers, already very extensive under the existing law, would be enhanced even more -- to the disadvantage of other competitors who lack an antitrust exemption.

The sponsors have described this bill as a "technical" amendment to clarify the intent of the original law. They contend that it is necessary because Congress could not have foreseen changes in the newspaper business. They say that without it they fear legal problems should they make wrong guesses about the activities of a JOA.

First, we question whether the sponsors can speak to the intent of Congress. Whatever that intent was, it is in the record and the record should stand.

Second, if there are ambiguities in the law's interpretation, why should Congress seek to resolve them in favor of large combined operations which already have an antitrust exemption? Why not resolve them in favor of smaller competitors?

We do not think it is sound public policy to grant JOAs even broader exemptions from the antitrust laws. There is no economic peril to JOA operators if this amendment fails. At the worst, they might face a court interpretation of their activities, which is a normal business risk. The passage of the amendment will adversely affect smaller competitors and stands to restrict rather than foster competition in individual markets.

Cordially,

Bruce H. McIntyre

BHM/lj

bc: Congressman Broomfield

Executive Summary
of First Draft of Chapter Entitled
"The Impact of the Newspaper Preservation Act
on News and Editorial Content In Daily Newspapers"
from Press Concentration and Monopoly
by

Stephen Lacy
Michigan State University

Sponsors and supporters of the Newspaper Preservation Act (NPA) admit it legalized the violation of some portions of antitrust laws. They have also argued that these violations are necessary to retain two independently owned newspaper voices within a city. This argument is based on two economic realities of the newspaper industry. First, newspapers sell information to consumers and space to advertisers. This results in the newspaper with the greatest circulation getting a disproportionate percentage of advertising linage. Second, the economies of scale from newspaper production methods means the newspaper with the greatest circulation is likely to get a greater marginal profit per issue than the second place newspaper. These two forces have combined to make separately owned and operated newspapers in a city almost extinct. NPA supporters conclude that joint operating agreements (JOA) legalized by the act at least leave two separately owned, if not two separately operated, newspapers.

Critics of the NPA have attacked it on many grounds. Underlying these attacks is the assumption that two editorial voices cannot exist in a city unless the newspapers are separately owned and operated. The curious aspect of the NPA debate is that empirical evidence for either side is rare. The research that exists is inconclusive. The following chapter is an examination of whether the NPA has been successful.

The success of a JOA at retaining two editorial and news voices can be evaluated on the basis of two questions. First, do newspapers resulting from JOAs more closely resemble competitive or monopoly newspapers.? Second, do the two JOA newspapers in a city differ, or are they so similar that losing one newspaper would not have an impact on the information market? The first question deals with the allocation of resources by managers of JOA newspapers and the second with diversity of newspapers in a JOA city. This chapter uses 114 newspapers from across the United States to answer these two questions. The 114 newspapers include 21 of the 44 JOA newspapers that existed in 1984, 21 of the 60 competitive newspapers, and 72 monopoly newspapers. A competitive newspaper is define here as one that has its main editorial office in a city with another separately owned and operated newspaper. Monopoly refers to the only newspaper with main editorial offices within a city.

To answer the first question, joint operating agreement newspapers were compared with competitive newspapers and with monopoly newspapers on 22 content measures. There were statistically significant differences between JOA and competitive newspapers on five measures. JOA newspapers averaged fewer total reporters, a smaller percentage of news and editorial section given to copy rather than ads, shorter hard news stories, shorter stories overall, and a greater percentage of the editorial and op ed pages given to editorials than did competitive newspapers. Of these measures, only the difference in space given news and editorial copy presents a strong argument for JOA newspapers not providing as good an informational product as competitive newspapers. The story length is probably a result of the difference in space allowed for news. JOAs have shorter stories because they are squeezing news into a smaller space. The difference in reporters is due to the difference in circulation and size of newspapers. JOAs are in smaller cities and therefore tend to be smaller newspapers. A more accurate measure of commitment to editorial staff is space per reporter. This represents roughly how much work is expected from reporters. When the number of square inches per reporter was compared, there was not a statistically significant difference between JOA and competitive newspapers. The fact that JOA newspapers had a higher percentage of editorial space given to editorials is a

argument for JOAs doing a better job than competitive newspapers in performing the editorial functions of newspapers.

While the comparison of JOA and competitive newspapers resulted in statistically significant differences in five categories, a similar comparsison of JOA and monopoly newspapers yielded nine statistically significant differences. However, since JOA newspapers tend to have greater circulation than monopoly newspapers, circulation was controlled for by comparing the JOA newspapers with the 21 largest circulation monopoly newspapers. This resulted in statistically significant differences on seven measures. JOA newspapers had fewer square inches of copy per reporter, a smaller percentage of news section given to news copy, a greater number of wire services, a greater percentage of news space given to staff prepared copy, a greater percentage of news space given to stories about the city in which the newspaper was located, a smaller percentage of news space given to stories about the county in which the newspaper was located, and a greater percentage of the news and editorial sections given to op ed and editorial material than did monopoly newspapers. This indicates that JOAs did a better job of providing a variety of news sources, of providing local coverage, and of providing editorial and opposing opinions than did monopoly newspapers. Monopoly newspapers gave a higher percentage of space to county news and had a larger newshole in the news section.

The answer to the first question is that joint operating agreement newspapers are closer to competitive newspapers in makeup than they are to monopoly newspapers and generally produce a more locally oriented product than do monopoly newspapers.

The second part of this study involves an examination of four sets of JOA newspapers to see if newspapers within each set differ in content. These sets were the newspapers in San Francisco, Albuquerque, Knoxville, and Charleston. The two papers in each of these four cities were compared for news and editorial page allocation. There were minor differences in how news space was allocated in three of the sets. Three of the four sets of newspapers differed significantly in the way they used their editorial and op ed pages, while the fourth differed slighlty. Newspapers in three of the cities tended to emphasize different geographic problems in editorials and to distribute outside opinion and syndicated material differently in their editorial and op ed pages.

The answer to the question about diverse voices found by this study is that enough diversity existed to conclude the newspapers were not alike, especially in the way they perform the editorial function. However, the differences in news content were small.

This study is limited because it did not examine the meaning of the content in the news stories and editorials. However, there is enough evidence to conclude that JOA newspapers as a group are performing as the supporters of the NPA had hoped. Competitive separately owned and operated newspapers are preferable to JOA papars, but JOA newspapers are preferable to monopoly newspapers. While both monopoly and JOA newspapers tend to charge monopoly prices, JOAs provide an editorial product that closely resembles the product that comes from sperately owned and operated newspapers competing within a city.

The Impact of the Newspaper Preservation Act on News and Editorial Content in Daily Newspapers

Stephen Lacy
Michigan State University

The Newspaper Preservation Act has had a relatively quiet existence since the initial furor it caused in the late 1960s and early 1970s. Periodically, as another city loses one of its two remaining newspapers, the controversy has raged anew. Unfortunately, arguments hurled by zealots on both sides tend to obscure rather than reveal the impact of the Newspaper Preservation Act. As the following chapter will show, this act has neither severely damaged the First Amendment nor saved the newspaper industry from its march toward single-newspapers cities. In reality, the act has had some success, but it has not been as successful as sponsors would have liked.

The Newspaper Preservation Act, which was passed in 1970, is a relatively concise document. It exempts certain newspapers from some portions of antitrust law and allows two newspapers in the same city to pool their advertising, circulation, production and business departments in order to promote competition between the two editorial departments, which must remain separate. This combination is called a joint operating agreement. An agency that is run independently from the newspaper ownership administers the agreement and divides the profits.

Twenty-two JOAs existed when the act was passed in reaction to a court case that ruled the Tucson JOA had violated sections 1 and 2 of the Sherman Antitrust Act (Martel and Haydel, 1984). Although the industry was experiencing more and more monopoly markets, the act was not welcomed by all as a way to promote editorial competition. Many of the arguments presented when the law was passed continue to be repeated (Carlson, 1982; Holder, 1982). A remarkable aspect of the entire legal process is that the underlying assumption that joint operating agreements would promote editorial competition was not tested empirically before the Newspaper Preservation Act was passed. Since 1970, JOAs have received limited empirical examination. The purpose of this chapter is to review the arguments concerning joint operating agreements in light of developments in the newspaper industry since 1970 and to use empirical analysis to test the underlying assumption about JOAs.

History of the Joint Operating Agreements

The Albuquerque (New Mexico) Journal and Tribune formed the first joint operating agreement in 1933, when they combined all but their editorial departments. During the next 33 years, newspapers in 21 other cities entered similar agreements. Table 1 shows the most active year was 1950, when eight newspapers signed JOAs in four cities. The Justice Department filed suit against the Tucson agreement in 1965 for violation of the Sherman

and Clayton acts. The district court in United States v. Citizen Publishing, et al (reported in Senate Hearings on Failing Newspaper Act, 1968-69) found that the Citizen Publishing and Star Publishing companies had violated section 1 of the Sherman Act by price fixing, profit pooling and market allocation agreement, and section 2 of the Sherman Act because the joint operating agreement gave the newspapers monopoly power over the market. The court also held that Arden, a group of stockholders in the Citizen Publishing Company, had violated the Clayton Act by acquiring the Star Publishing Company. Arden was ordered to divest itself of Star stock, and the defendants were ordered to modify the agreement to eliminate the price fixing, profit pooling and market allocation. The district court findings were upheld by the Supreme Court in 1969 (Citizen Publishing Co. v. United States). The Tucson newspapers argued they had merged, but the court said a merger had not taken place because the editorial voices remained separate (Matsunaga, 1969).

Reaction to the Justice Department's suit came quickly. Even before the Supreme Court had ruled on the case, the Failing Newspaper Act was introduced in the Senate in 1967 (Martel and Haydel, 1984). Sixteen similar bills were introduced in the House in 1968, followed by 30 such bills the next year. The Newspaper Preservation Act, which was ultimately passed in 1970, had 101 co-sponsors during the 91st Congress (Carlson, 1982), most of whom were from states with joint operating agreement newspapers (House hearings, 1969). The act allowed the 44 newspapers in 22 cities with joint operating agreements to be exempted from certain aspects of the antitrust laws, and it also set up standards for new agreements to be formed. The standards stated that the attorney general must give written approval to the agreements and that one of the newspapers in the agreement must be failing, meaning it must be "in probable danger of financial failure" (Patkus, 1984).

Since its passage, there has been disagreement over how the Newspaper Preservation Act should be applied. Publishers reacted against Attorney General John Mitchell's rule that applicants for JOAs must disclose their financial data (Keep, 1982). The constitutionality of the act was tested and upheld when the Bay Guardian Company filed suit against the JOA in San Francisco in 1970, charging that the Examiner and Chronicle were financially healthy and their JOA should be disallowed (Keep, 1982). A recent JOA application resulted in the refining of what qualifies as a failing newspaper. In approving the application of the Seattle Times and the Seattle Post-Intelligencer for a joint operating agreement, the Attorney General ruled that the existence of an alternative purchaser was irrelevant to satisfying the "failing newspaper" test (Carlson, 1982).

Despite arguments both for and against the Newspaper Preservation Act, it has had little impact on the newspaper industry, except for legalizing the original JOAs. Twenty-two

JOAs existed when the act was passed. In 1986, 21 JOAs existed, but as Table 1 shows, they are not all the same newspapers that had agreements when the NPA was passed. Of the agreements in 1970, the ones in Bristol, Tennessee and Franklin-Oil City, Pennsylvania have been replaced with a single newspaper, and St. Louis has become a competitive market again. Chattanooga, Tennessee had an agreement until 1966 when it was dissolved, but another agreement was established in 1980. The Anchorage Daily News and Times joined in 1974, but the agreement dissolved in 1979 after the Daily News filed suit against the Times in 1977 (Keep, 1982). The other two agreements existing in 1985 are in Cincinnati, Ohio, and Seattle, Washington. The agreement in Columbus, Ohio expired in 1985 and was not renewed.

TABLE 1

Cities with Joint Operating Agreements in 1969 and 1986

1969 JOA Cities and Year the Agreement Was Started

Albuquerque, N.M.	1933	Salt Lake City, Utah	1952
El Paso, Texas	1936	Shreveport, La.	1953
Nashville, Tenn.	1937	Franklin-Oil City, Pa.	1956
Evansville, Ind.	1938	Knoxville, Tenn.	1957
Tucson, Ariz.	1940	Charleston, W.V.	1958
Tulsa, Okla.	1941	Columbus, Ohio	1959
Madison, Wis.	1948	St. Louis, Mo.	1959
Fort Wayne, Ind.	1950	Pittsburgh, Pa.	1961
Bristol, Tenn.-Va.	1950	Honolulu, Hawaii	1962
Birmingham, Ala.	1950	San Francisco, Calif.	1965
Lincoln, Neb.	1950	Miami, Fla.	1966

1986 JOA Cities

Albuquerque, N.M.	Shreveport, La.
El Paso, Texas	Knoxville, Tenn.
Nashville, Tenn.	Charleston, W.V.
Evansville, Ind.	Seattle, Wash.
Tucson, Ariz.	Pittsburgh, Pa.
Tulsa, Okla.	Honolulu, Hawaii
Madison, Wis.	San Francisco, Calif.
Fort Wayne, Ind.	Miami, Fla.
Birmingham, Ala.	Cincinnati, Ohio

TABLE 1 - Continued

Lincoln, Neb.	Chattanooga, Tenn.
Salt Lake City, Utah	

Sources: 1969 cities were listed in 1969 House Antitrust Subcommittee Hearings on the Newspaper Preservation Act; 1986 cities came from 1986 Editor & Publisher International Yearbook and telephone calls to some newspapers executives.

The 44 newspapers with joint operating agreements in 1984 had a total circulation of 4,915,990, which accounted for 7.8 percent of total daily circulation in the United States. The 60 competitive newspapers had a combined daily circulation of 13,692,977. The average circulation for JOAs was 109,244, while the average daily circulation for competitive newspapers was 228,216.

The Debate Over Joint Operating Agreements

The newspaper industry and newspaper scholars were split during the congressional hearings about the Newspaper Preservation Act. The American Newspaper Publishers Association supported the act (Keep, 1982), as did newspapers such as the The Washington Evening Star, Chicago Sun-Times and Chicago Daily News (House hearings, 1969). Raymond Nixon supported the act (House hearings, 1969), while other scholars, such as Stephen Barnett and John R. Malone (House hearings, 1969), argued against the act. In addition to the U.S. Attorney General and the Federal Trade Commission, the Newspaper Guild and several independent publishers opposed the act (Keep, 1982).

The testimony of Barnett and Malone probably serves best to summarize the arguments against legalizing joint operating agreements. Barnett said in his testimony before the House Antitrust Subcommittee in 1969 (House hearings, 1969) that there was no evidence second newspapers were disappearing from the newspaper industry. He contended that the decline of competition represented the loss of third and fourth newspapers from the market. He also said that the purpose of the act was not to preserve a second newspaper, but to protect existing publications from competition so they could reap monopoly profits. Third, Barnett argued that the Newspaper Preservation Act would actually inhibit competition because it would make entry into a market more difficult for a third paper. Fourth, he said the NPA would violate the historic independence of American newspapers.

Arguments advanced by Malone (House hearings, 1969) were similar to Barnett's, although Malone was much more savage in his criticism of the bill. He, like Barnett, argued that the Newspaper Preservation Act would violate the independence of the press as set forth in the First Amendment. He described a dilemma for the public that would come from passage of the act:

> I submit that a government licensed monopoly must shortly become a government regulated monopoly, or else this nation must return to the seventh century where unregulated crown monopolies are granted. (House hearings, 1969, p. 338)

He said the act would allow predatory practices to the detriment of the reading and advertising public. He agreed with Barnett that barriers to entry would be difficult to overcome.

William McCulloch (House hearings, 1969), as well as Barnett, expanded on the barrier to entry argument by saying that this would be particularly applicable to suburban newspapers that might want to move into central cities. Both also argued that the newspaper industry was in fact quite healthy.

Since the passage of the Newspaper Preservation Act, the same arguments have been advanced with a few new ones added. David M. Rubin argued (Keep, 1982) that the government does not have similar laws for magazines, newsletters or weekly newspapers because these firms do not have as much clout. He also expressed concern about the permanent nature of JOAs. Once formed, they need not be reexamined if the market changes.

Humphrey (1970-71) was lukewarm in his support, saying that the Newspaper Preservation Act would save those newspapers with agreements when the act was passed, but that it was limited in doing anything about future decline in newspaper competition. His argument, which has been supported by events since 1970, was that the cause of declining competition had not been addressed by the act. He suggested a progressive tax on advertising revenue.

Fewer arguments were advanced in favor of the Newspaper Preservation Act than opposing it. The original arguments for legalizing joint operating agreements were based on an assumption that most cities could not support two daily newspapers. Rosse (1980) attributed the decline of competition to the economies of scale that come from large newspaper organizations. The first issue costs are high because the costs of equipment and staff just to produce the first issue are fixed. Costs of additional issues come only from the ink, paper, energy and additional production staff time. Thus, the average and marginal cost of newspapers decreases rapidly with the increase in the number printed. Decreasing marginal cost combined with constant price results in increasing marginal profits. Nixon pointed this out in the subcommittee hearings (House hearings, 1969).

A second characteristic of the newspaper industry that also contributes to single newspaper cities is the circulation spiral. As a newspaper acquires a majority of circulation in a market, it begins to attract a disporportionate percentage of newspaper advertising. This in turn helps to attact more readers, which also attracts more advertising. The trailing newspaper falls further and further behind behind in advertising and circulation until it cannot survive (Martel and Haydel, 1984; and Gustafsson,

1978). Matsunaga mentioned this spiral in the statement by 59 co-sponsors of the act (House hearings, 1969).

Proponents of the act argued that the government must do something to preserve a second editorial voice in markets where only one newspaper can survive without external interference. Matasunaga summarized the stand well when he said:

> The real and vital issue before this subcommittee and the Congress is a free press versus the sanctity of our antitrust laws. The initial responsibility falls upon members of this subcommittee to decide which is in the best interest of the general public: a free press or the sanctity of our antitrust laws (House hearings, 1969, p. 18).

If one accepts the inevitability of one-newspaper cities, Mansunaga's statement becomes the justification for joint operating agreements. However, both proponents and opponents neglected to examine whether joint operating agreements actually preserve a second voice. Some critics used examples from particular JOAs (Carlson, 1971) to support the argument that the agreements do not provide separate voices, but anecdotal evidence can be found to support both sides. What was lacking during the hearings on the Newspaper Preservation Act, and is still lacking for the most part, was empirical evidence to support one side or the other.

Evidence Concerning the JOA Debate

With fifteen years of experience to draw on, it would seem that some judgment could be made about the validity of arguments concerning joint operating agreements. The arguments in favor of JOAs are simply that most cities can only support one newspaper without intervention from the federal government and that a JOA would allow survival of a second editorial voice. This voice would provide additional information in the marketplace for information. The opponents and proponents have presented little evidence concerning the latter point. Instead, those who oppose JOAs argue that the disadvantages of the act would negate any benefits that might occur. Opponents argue: first, cities are not necessarily doomed to have only one newspaper; second, JOAs are barriers to entry that actually exclude newspapers that might start in cities with failing newspapers; third, in reality JOAs are just a way of giving publishers monopoly profits; fourth, JOAs create difficulties for suburban newspapers because they limit entry into central markets and give the JOA newspapers monopoly profits and lower costs that can give them an advantage in competition with suburban newspapers; fifth, the JOA is unconstitutional because it violates the First Amendment.

At the heart of the whole controversy is the question of whether most cities can support more than one newspaper. When the act was passed in 1970, there were 45 cities in the United States with separately owned and operated newspapers. Thirty

such cities existed in 1984. Although these figures indicate a loss of 16 competitive cities, actually 26 cities have lost a second newspaper during these 15 years, and 10 cities have gained newspapers. Of the 26 cities that lost separately owned and operated newspapers, three became joint operating agreement cities. It appears new newspapers can start, but the number is not keeping up with those that are going cut of business. Most of the new second dailies started in smaller cities, such as Manchester, Connecticut, Cookeville, Tennesse, and Green Bay, Wisconsin. Cities that lost newspapers tended to be larger, such as Forth Worth, Newark, Philadelphia and Cleveland. There are exceptions, but the general trend is that larger cities are more difficult to enter because of the high start-up costs of a newspaper large enough to compete in a large city. A second conclusion suggested by the changes is that JOAs are not a way to insure a second voice in most cities that are losing daily newspapers. The reason is simple. If a newspaper is truly failing, the dominant daily will be best served by letting it fail (Holder, 1982; Patkus, 1984). Why should a newspaper that can become a monopolist support a newspaper that will prevent it from being so? Experience indicates that most large cities, if not most cities, simply cannot support two dailies under present law and technology.

The second argument by the opponents, that JOAs are a barrier to entry, is difficult to assess. There is probably some validity to it because no third newspapers have started where a JOA exist, but, at the same time, few if any third newspapers have started in markets with two separately owned and operated newspapers.

The opponents' argument that JOAs give publishers monopoly profits has little empirical evidence, but since monopoly newspapers make monopoly profits (Owen, 1969; Mathewson, 1972; Kerton, 1973; Block, 1955; and Grotta, 1971) and JOAs have business organizations similar to monopoly newspapers, joint operating agreement newspapers probably make monopoly profits. A proponent for JOAs would say the difference between the monopoly and JOA markets is not that they don't both make monopoly profits, but that in the JOA the profits are split between two organizations that provide two voices. Once again, this argument comes back to whether JOAs actually provide two voices.

A fourth argument is that JOAs hurt suburban newspapers. Here, at last, there is some evidence to test the validity of this argument. Niebauer (1984) studied six matched pairs of competitive and JOA newspaper markets for the impact on suburban newspapers. These areas were matched for number of households, income per capita, population, retail sales and metropolitan

daily newspaper circulation. Niebauer found no difference in the number of suburban newspapers in competitive markets and markets with JOAs. However, he found the suburban newspapers in JOA markets had more than twice the circulation of the suburban newspapers in markets with competitive central markets. He suggested the difference could be due to poor management, or to a lower quality product in JOA markets because the competition is not felt. The latter seems unlikely because the circulation in many JOAs determines how the profits will be divided, plus editorial competition may be due to factors other than economic. Whatever the reason, Niebauer concluded that JOAs have kept a second voice, even if it is weak, without hurting the suburban press.

The final argument against JOAs is that they are unconstitutional. As mentioned above, the act has been found to be constitutional (Patkus, 1984). It is in reality a narrow exemption to antitrust laws. Such exemptions existed for other industries, such as insurance, before 1970 (Matsunaga, 1969).

Since JOAs probably allow monopoly profits, the important question becomes whether they also allow two separate voices to exist in a market that would probably not have two without the agreement. Based on the trend toward disappearing second newspapers within a city, many would not have a second newspaper without the JOA. Blankenburg (1986) studied newspapers that eliminated an afternoon or morning edition between 1970 and 1984. He developed a discriminant analysis function to classify newspapers that consolidated editions during this time. Blankenburg said this function predicted five JOAs should have lost one of the editions. This indicates that at least some cities would not have had two editorial voices without JOAs. But does the JOA really provide a second voice? This is the subject of the next section and will involve two questions. First, do JOA newspapers more closely resemble competitive or monopoly newspapers in their content? Second, do the two newspapers under a joint operating agreement tend to be similar or different in content?

Two empirical studies have been conducted that are related to these two questions. Ardoin (1973) concluded that JOAs did not appear to keep two different news voices in a market. He modified this conclusion by adding that there were some differences in the 36 newspapers he analyzed using 10 categories of news topics, but that the differences were not consistent. He also added that the comparison was for quantity of space and not quality of coverage. He also qualified by saying that when his results were compared to earlier studies of competitive versus non-competitive newspapers, the content of the JOA newspapers in his study seemed slightly more like the competitive newspapers. Hicks and Featherston (1978) compared three markets; two had

jointly owned morning and evening newspapers, while the third had a joint operating agreement for the morning and evening newspapers. They found that in all three situations there was little overlap of content in the morning and evening newspapers. This included the JOA in Shreveport, Louisiana.

Comparison of Competitive, Monopoly and JOA Newspapers

In the absence of empirical evidence about the effects of JOAs on newspapers within a city, arguments about this impact could rage until JOAs cease to exist. In an effort to solve the controversy, this section will attempt to answer with an empirical study whether news and editorial content in joint operating agreement newspapers more closely resembles content in competitive or in monopoly newspapers. The next section will use the same data to examine four pairs of JOA newspapers to see if they are similar in news and editorial content. These data came from a national stratified sample of 120 newspapers. The newspapers were stratified for ownership and market structure as part of the author's dissertation (Lacy, 1986). Newspapers were randomly selected within the strata. Competitive and JOA markets were oversampled because they constitute a small proportion of total newspaper markets in the United States. A constructed week from November 1984 was content analyzed for 114 newspapers in the sample. This final sample included 21 competitive, 21 JOA, and 72 monopoly newspapers, which was 35 percent of the competitive newspapers and 48 percent of the JOA newspapers in the United States. The monopoly papers in the sample equaled about 4.5 percent of all monopoly newspapers.

Three types of allocation processes were assumed to affect the content of the newspapers. A news space allocation process was assumed to affect the space allocation of the news sections. This process involves the day-to-day decisions made by the editorial staff about how the news space in the paper will be filled. An editorial space allocation process, which allocated space on the op ed and editorial pages, was also assumed. While there may be an overlap in responsibility on smaller newspapers, these two processes are usually separate. The third allocation process assumed is the budgeting process, which is the regular allocation of money in order to produce the news-editorial portion of the newspaper. This involves money spend on wire and syndicated services, staff, equipment, travel, and other editorial expenses. Support was found for the existence of the budget and editorial allocation processes (Lacy, 1986).[1] The three process assumption will be used here for analyzing the content of the JOA newspapers.

T tests were used to analyze differences in 22 content categories between JOA and competitive newspapers and between JOA and monopoly newspapers.[2] A competitive newspaper was defined as a newspaper with one or more separately owned and operated

dailies located in the same city. A monopoly newspaper was one that had no competiting dailies in the same city. Comparisons of news and editorial space allocations were made on the basis of percentage of space given to various categories. These percentages represent the judgment of the newspaper staff in allocating space. Simple measures of total space are more representative of economic well-being and can be misleading. In a cross-sectional study, such as this, the size of the market is important in determining the size of the newspaper. A difference in square inches could simply be due to market size and not to any decision variable.

Table 2 shows the comparison of JOA and competitive newspapers in 22 content categories broken down by allocation process. There is also a comparison of circulation and city population. Five of the 22 categories showed statistically significant differences at the $p < .05$ level. Two were in the budget allocation, two in news space allocation and one in editorial op ed space allocation. Competitive newspapers tend to have a higher percentage of their news section given to the newshole and a greater number of reporters. The number of reporters is probably a reflection of the greater circulation of competitive newspapers, which is also shown in the table. There was no statistically significant difference in square inches per reporter, a measure that adjusts for the size of newspaper when considering differences in staff size.

TABLE 2

T-TEST FOR COMPETITIVE AND JOINT OPERATING NEWSPAPERS

Variable	Compet. Mean	JOA Mean	D.F.	T Value	Sig.
City population (in thousands)	1,245.797	326.433	21	-2.42	.024
Average daily circulation (in thousands)	292.891	126.021	24	-2.09	.048
		Budget Allocation			
Number of reporters	47.900	25.714	22	-2.71	.013
Percent of total newspaper space given news and editorial matter	.093	.091	29	- .26	.800
Square inches of news copy per reporter	322.668	286.668	27	- .71	.481
Percent of news section used as newshole	.597	.495	24	-2.76	.011

Number of wire services	4.333	3.714	40	- .90	.374
Percent of news section given in-depth coverage	.006	.009	40	1.21	.234
News Space Allocation					
Percent of news section given wire copy	.220	.243	29	1.29	.208
Percent of news section given staff copy	.193	.164	26	-1.40	.173
Percent of news section given city coverage	.083	.080	34	- .36	.720
Percent of news section given county coverage	.029	.020	30	-1.68	.104
Percent of news section given visual material	.155	.149	40	- .47	.641
Percent of news section given foreign coverage	.066	.055	28	-1.50	.146
Percent of news section given hard news	.181	.176	40	- .37	.716
Average square inches per hard news story	18.53	15.13	40	-3.72	.001
Average square inches per story in news section	19.91	16.37	33	-3.34	.002
Editorial and Op Ed Space Allocation					
Percent of op ed/ editorial pages given editorials	.140	.179	40	2.21	.033
Percent of op ed/ editorial pages given editorials about city	.019	.029	32	1.76	.088
Percent of op ed/ editorial pages given editorials about the county	.012	.028	23	.82	.422
Percent of op ed/ editorial pages given letters and guest columns	.253	.184	24	-1.55	.134

Table 2 - Continued

Percent of op ed/ editorial pages given columns	.446	.446	27	- .01	.993
Percent of op ed/ editorial page given cartoons	.163	.178	40	.79	.433
Percent of news and editorial section gievn all editorial and op ed matter	.088	.099	40	1.57	.124

Note: N = 21 for all cases except numbers of reporters competitive newspapers, where N = 20.

The only differences in news space allocation were in length of stories. JOA newspapers tended to have shorter hard news stories and shorter stories overall. The distribution of news based on source, geography or hard news coverage was not different. The only difference in the editorial space allocation is that JOA newspapers gave a higher percentage of total editorial and op ed space to editorials than did competitive newspapers.

It is notable that the 21 JOA and 21 competitive markets were statistically different in circulation and city population. This difference may well have contributed to the budget allocation differences, but since the overall number of differences were few and the difference in circulation for the sample probably are reflected in the populations, circulation was not controlled for in this analysis.

The comparison of JOA and monopoly newspapers is shown in Table 3. The two types of newspapers differ in nine of 22 categories. All six of the budget allocation comparisons show a statistically significant difference. Monopoly newspapers had fewer full-time reporters and more square inches of copy per reporter. They gave a higher percentage of total newspaper to editorial and news material and a higher percentage of the news section to the newshole. They had fewer wire services and a smaller proportion of the newshole given to in-depth coverage than did JOA newspapers.

TABLE 3

T-TEST FOR MONOPOLY AND JOINT OPERATING NEWSPAPERS

Variable	Monopoly Mean	JOA Mean	D.F.	T Value	Sig.
City population (in thousands)	40.295	326.433	21	-6.51	.001
Average daily circulation (in thousands)	29.501	126.021	24	-3.74	.001
		Budget Allocation			
Number of reporters	9.087	25.714	88	-6.65	.001
Percent of total newspaper space given news and editorial matter	.116	.091	52	4.23	.001
Square inches of news copy per reporter	690.786	286.668	84	7.08	.001
Percent of news section used as newshole	.602	.495	57	7.15	.001
Number of wire services	1.653	3.714	23	-4.21	.001
Percent of news section given in-depth coverage	.003	.009	26	-3.37	.002
		News Space Allocation			
Percent of news section given wire copy	.253	.243	71	.88	.381
Percent of news section given staff copy	.127	.164	91	-3.61	.001
Percent of news section given city coverage	.077	.080	63	- .50	.621
Percent of news section given county coverage	.046	.020	85	6.42	.001
Percent of news section given visual material	.154	.149	91	.45	.657
Percent of news section given foreign copy	.048	.055	91	-1.45	.152
Percent of news section given hard news	.178	.176	91	.13	.897

Average square inches for hard news stories	16.33	15.13	57	1.55	.128
Average square inches for stories in news section	16.48	16.37	91	.12	.908
Editorial and Op Ed Space Allocation					
Percent of op ed/ editorial pages given editorials	.128	.179	69	-2.99	.004
Percent of op ed/ editorial pages given editorials about city	.017	.029	91	-1.61	.110
Percent of op ed/ editorial pages given editorials about the county	.012	.028	21	- .88	.391
Percent of op ed/ editorial pages given letters and guest columns	.177	.184	91	- .24	.812
Percent of op ed/ editorial pages given columns	.490	.446	87	1.54	.127
Percent of op ed/ editorial pages given cartoons	.176	.178	62	- .09	.931
Percent of news and editorial sections given all editorial and op ed matter	.092	.099	71	-1.02	.312

Note: N = 72 for the monopoly sample, except for number of reporters and square inches of copy per reporter, where N = 69. N = 21 for the JOA sample.

The only differences in news space allocation were in percent of newshole given to staff copy and to county coverage. JOAs had a higher proportion of news section given to staff copy and a smaller proportion to county coverage. In the editorial op ed space allocation process JOA newspapers gave a greater percentage of space to editorials than did monopoly newspapers.

Just as with the comparison of competitive and JOA newspapers, there was a statistically significant difference between monopoly and JOA newspapers in circulation and city population. Monopoly newspapers averaged only 29,501 circulation, compared to 126,021 for JOA newspapers. Because this difference could account for the differences in budget allocation, circulation was controlled for by comparing the 21 largest circulation monopoly newspapers with the 21 JOA newspapers.

Table 4 shows the results from controlling for circulation when comparing JOA and monopoly newspapers. There were no

statistically significant differences in circulation between the JOA newspapers and the 21 largest monopoly newspapers in the sample. As a result of controlling for circulation, three of the six budget allocation categories are still statistically significant at the $p < .05$ level, and two were still close to significance at $p = .056$ and $p = .076$. In the news space allocation process, the proportion of staff copy and county coverage continue to be significant at the $p < .05$ level, but the proportion of newshole given city coverage also became significant. JOA papers gave a higher percentage of space to city coverage than did monopoly newspapers.

TABLE 4

T-TEST FOR MONOPOLY AND JOINT OPERATING NEWSPAPERS CONTROLLING FOR CIRCULATION[a]

Variable	Monopoly Mean	JOA Mean	D.F.	T Value	Sig.
City population (in thousands)	88.182	326.433	29	-4.94	.001
Average daily circulation (in thousands)	75.775	126.021	40	-1.49	.145
Budget Allocation					
Number of reporters	18.289	25.714	40	-1.97	.056
Percent of total newspaper space given news and editorial matter	.095	.091	40	.78	.440
Square inches of news copy per reporter	434.600	286.668	40	3.79	.001
Percent of news section used as newshole	.548	.495	40	2.61	.013
Number of wire services	2.286	3.714	34	-2.54	.016
Percent of news section given in-depth coverage	.005	.009	40	-1.82	.076
News Space Allocation					
Percent of news section given wire copy	.252	.243	40	.69	.492
Percent of news section given staff copy	.142	.164	40	-2.08	.044

Table 4 - Continued

Percent of news section given city coverage	.062	.080	40	-2.33	.026
Percent of news section given county coverage	.050	.020	25	4.17	.001
Percent of news section given visual material	.145	.149	40	- .31	.761
Percent of news section given foreign copy	.055	.055	40	- .03	.977
Percent of news section given hard news	.168	.176	40	- .57	.572
Average square inches for hard news stories[a]	15.55	15.13	40	.47	.638
Average square inches for stories in news section	16.84	16.37	40	.52	.604
Editorial and Op Ed Space Allocation					
Percent of op ed/ editorial pages given editorials	.173	.179	40	- .34	.733
Percent of op ed/ editorial pages give editorials about city	.022	.029	40	- .98	.334
Percent of op ed/ editorial pages given editorials about the county	.017	.028	23	- .55	.590
Percent of op ed/ editorial pages given letters and guest columns	.188	.184	40	.19	.853
Percent of op ed/ editorial pages given columns	.474	.446	40	1.02	.313
Percent of op ed/ editorial pages given cartoons	.165	.178	40	- .71	.482
Percent of news and editorial sections given all editorial and op ed matter	.084	.099	40	-2.55	.015

[a] Circulation was controlled for by comparing the 21 JOA newspapers to the 21 monopoly newspapers with the largest circulation. As a result, the t test for circulation was no longer significant at the $p < .05$ level.

Controlling for circulation changed the editorial op ed measures. Percentage of space given editorials was no longer significant, but the percentage of news and editorial space given to all editorial matter became statistically significant. JOA papers had a higher proportion of space given to all editorial and op ed material. Overall, differences in six measures remain statistically significant.

The t test indicates that JOA papers are more like competitive newspapers than monopoly newspapers in the space per full-time reporters and in the number of wire services carried. JOA papers differ from both monopoly and competitive newspapers in the percentage of news section given to the news hole. In editorial op ed space allocation, there is little difference among the three types of newspapers. JOA newspapers differ from monopoly newspapers in one such category and from competitive newspapers in a different editorial category. JOA newspapers are similar to monopoly newspapers in length of stories but are similar to competitive newspapers in the distribution of space among news and source categories. JOA papers differ from monopoly newspapers in proportion of newshole given to staff copy, city coverage and county coverage, which are three out of seven news space allocation measures.

In summary, JOA newspapers resemble competitive newspapers more than monopoly newspapers in the way they allocation funds to wire services and reporters and the way they allocate news space. There is little difference among the three in editorial and op ed space allocation.

Comparison of Pairs of JOA Newspapers

The sample of 21 joint operating agreement newspapers contained pairs of newspapers from four cities. These newspapers from San Francisco, Albuquerque, Knoxville and Charleston were compared to see if the newspapers within a particular town differ. While this analysis will not deal with the particular subjects of stories or the quality of the writing, editing and graphics, it can still give some idea about whether the newspapers differ in the allocation of space to certain categories of information and the allocation of revenue for the news-editorial product. This analysis is not meant to argue for the superiority of one newspaper over another, but rather whether they tend to be different in the allocation processes mentioned above.

Since JOA newspapers are similar to competitive newspapers, it would seem logical that the same market forces that affect content in competitive newspapers will affect content in JOA newspapers. Several scholars (Corden, 1952-53; Reddaway, 1963; Rosse, 1967) have suggested that the theory of monopolistic competition (Chamberlin, 1950) applies to content competition in newspapers. Monopolistic competition treats the product as a

variable in determining supply and demand. The theory holds that producers attempt to differentiate their product from other products in various ways to generate demand. Price is only one variable in monopolistic competition because it is assumed to vary little. This type of price behavior is characteristic of newspaper subscription prices.

Monopolistic competition does not entirely explain newspaper behavior. If differentiation were carried to its logical end, newspapers would be segmenting the market with little cross-elasticity of demand for two newspapers in the same market. This could be said to be true for a market such as New York, where three newspapers compete, but the Daily News and Post are better substitutes for each other than for the Times. The reason this segmentation does not apply to most two-newspaper markets is the desire of advertisers to have the greatest audience for their advertisements (Rosse, 1980). This is also why the circulation spiral develops. As a result of this pressure to compete for the same audience, two newspapers in the same market tend to differentiate themselves while trying to remain substitutes for each other. This means the differences between two newspapers in a competitive or JOA market will not be great. Monopolistic competition also does not fit the newspaper industry exactly because it assumes many sellers, and competitive daily newspapers have only one or two other newspapers in the same city. The treatment of the product as the crucial variable is still an important concept that fits newspaper competition well.

Chi-square was used to test the probability that the distribution of the news and editorial space processes could be due to chance. Chi-square compares the actual distribution of responses in categories to a theoretical distribution (Williams, 1979). In this study it was used to test the distribution of sources of news, subject of news, type of coverage and length of story in the news space allocation process.[3] Chi-square was used to examine the distribution of types of material on editorial and op ed pages and the subjects of editorials.[4] Chi-square was not appropriate for many of the figures in the budget allocation process because they tend to vary relatively little during the month, while allocation of news and editorial space will vary from day to day. The only budget allocation figures that could be tested are the allocation of newspaper space to the news section and the allocation of the news section space between advertising and newshole. No statistically significant differences were found on these measures for the four pairs of newspapers.

Since economic theory would suggest that forces in competitive newspaper markets work to make the distribution of space similar in order to remain substitutes, but at the same time different to differentiate, a higher probability level will be used here to indicate a statistically significant relationship

for the November newspapers. A level of $p < .10$ will be used instead of the $p < .05$ level for statistical significance, which is generally used (Weaver, 1981).

San Francisco Chronicle and Examiner

Table 5 shows a comparison of content measures for the two San Francisco JOA newspapers. The measures include total square inches per category for the constructed week and the percentage of space devoted to the various categories. The combined Sunday issue was excluded from the analysis because it would have complicated the analysis of priorities for the two newspapers. The figures presented here represent the six other days of the week.

TABLE 5

COMPARISON OF THE SAN FRANCISCO CHRONICLE AND SAN FRANCISCO EXAMINER[a]

Content Measure	Total Square Inches		Percent of Newshole	
	Chronicle	Examiner	Chronicle	Examiner
News Space Allocation				
Wire service copy	5,901	3,950	27.3	21.0
Staff copy	3,598	4,165	16.6	22.1
Copy about San Francisco	1,193	1,540	5.5	8.2
Copy about county[b]	814	823	3.8	4.4
Copy about a foreign country	2,007	1,273	9.3	6.8
Harn news copy	5,247	3,239	24.3	17.2
Photographs and other visuals	2,981	3,121	13.8	16.6
	Number of stories		Average square inches	
Hard news stories	264	186	20.0	17.0
All stories in news section	525	475	19.0	18.0
Editorial and Op Ed Space Allocation				
Content Measures	Total Square Inches		Percent of Editorial and Op Ed pages	
	Chronicle	Examiner	Chronicle	Examiner
Letters to the editorial and guest editorials	390	197	25.0	9.4
Syndicated or staff columns	708	972	45.4	46.4

Table 5 - Continued

Cartoons	199	529	12.8	25.3
All editorials	263	397	16.8	18.9
Editorials about San Francisco	42	65	2.7	3.0
Editorials about the county[b]	62	20	4.0	0.9
	Total Square Inches		Percent of Editorial and News Space	
All editorial and op ed material	1,560	2,094	6.4	9.6
	Budget Allocation			
Content Measure	Total Square Inches		Percent of Total Space in the Newspapers	
Total newspaper space	119,028	110,292	--	--
Total space in news sections	42,315	40,450	35.6	37.1
Total space given op ed, editorial, and news copy	11,496	10,218	9.6	9.2
	Total Square Inches		Percent of News Section	
Advertising in news section	20,704	21,106	48.9	54.0
Newshole in news sections	21,611	18,844	51.1	46.0
Space given in-depth coverage	178	234	.8	1.2
Average space per full-time reporter	225	192	--	--
	Number			
Full-time staff reporters	45	45		
Wire services	5	4		

Note: Chi-squares were used to test the probability that the distribution within six coding categories was due to chance. Of the four news categories, source, subject, type and length, only source was significant at the $p < .10$ level. Of the two editorial page categories, types of material and subject of editorials, the former was significant at the $p < .01$ level and the latter at the $p < .001$ level.

[a] The average daily circulation for the Chronicle in 1985 was 552,210, while the circulation for the Examiner was 227,351, according to 1985 Editor & Publishers International Yearbook.

[b] Here county coverage refers to coverage of the counties adjacent to San Francisco County.

The total space in the newspaper differed by slightly less than 9,000 square inches for the week. The Chronicle gave 11,496 square inches of the newspaper to copy in the news and editorial sections, compared to 10,218 by the Examiner. The newshole in the Chronicle news and editorial sections was 21,611 square inches, which represented 51.1 percent of the total news section space, while the newshole for the Examiner was 18,844 square inches, or 48.9 percent of the total news section.

Looking at the figure for news space allocation, the Examiner gave more space to staff copy and less to wire service copy than did the Chronicle. This applied to both total square inches and to the proportions. The Examiner also devoted more of its news section to copy about San Francisco and less to copy about foreign countries and news. The Chronicle gave more space to hard news and less to visuals than did the Examiner, but the hard news stories in the Chronicle ran longer on average by 3 square inches than did the hard news stories in the Examiner.

Although the differences in percentages are not great, the range of 7.1 to 2.5 percentage points indicates a difference in emphasis at least for the month of November. Overall, the Examiner tended to emphasize staff copy about local stories. It also had shorter stories and played up visuals. The Chronicle tended to emphasize more hard and foreign news with more wire service copy than did the Examiner. Overall, the Chronicle had more stories and news space.

While these differences in percentages hold for the six issues examined here, the results of chi-square reported at the bottom of Table 5 show that as a sample representing November, the relationships could be the result of chance. Only one chi-square, that of news source, reached the $p < .10$ level.

The difference in editorial space allocation is much greater. The smaller newspaper, the Examiner, devoted more space, 2,094 to 1,560 square inches, to the editorial and op ed pages than did the Chronicle. This amounted to 9.6 percent of the news and editorial newshole for the Examiner, which was 3.2 percentage points more than the Chronicle gave to editorial and op ed material. The allocation of editorial and op ed space also differed. The Chronicle gave a much larger proportion of its space to letters to the editor and guest columns tahn did the Examiner, 25 percent compared to 9.3 percent, which indicates a paper more open to readers and non-staff writers. The Examiner gave more space to editorial cartoons, 25.2 to 12.8 percent of the editorial and op ed pages. The Examiner had slightly more of its space given to editorials than did the Chronicle. The Chronicle tended to write more editorials about matters concerning nearby counties than it did about San Francisco; the opposite was the case for the Examiner.

Overall, the editorial and op ed pages appear to differ in

emphasis, with the Chronicle being more open to outside sources, but the Examiner being more concerned with editorial comment by staff editorial writers and cartoonists. The chi-square for the distribution of the types of editorial material is statistically significant at the $p < .01$ level, while the distribution among editorial subjects is also significant at the $p < .001$ level. The two newspapers did not show much difference in the budget allocation process. As mentioned above, the Chronicle had more space available for news and editorial matter, but the actual difference in news and editorial copy was slightly more than 200 square inches a day. The two papers had the same number of full-time staff writers, which means the Examiner reporters had less space to fill per reporter. This potentially heavier writing load for the Chronicle writers probably explains the increased use of wire service copy. The Chronicle also had one more wire services than did the Examiner, while the latter had slightly more in-depth reporting than the former.

For the constructed week in November 1984, there was a difference between the two San Francisco JOA newspapers. The Examiner was a more locally oriented newspaper that used more staff copy and graphics and also gave greater emphasis to editorial comment. The Chronicle had more international news and more wire service copy in the news columns, but made its editorial and op ed pages more accessible to outside agents than did the Examiner. Generalizing to the entire month of November, there was a statistically significant difference between the editorial and op ed page distributions of the two newspapers, but not between the news space allocations. The readers may not have had two different news voices, but there appears to be some difference in the topics covered by the city's two editorial voices.

Albuquerque Journal and Tribune

The Albuquerque Journal and the Albuquerque Tribune are compared in Table 6. If a JOA tends to force newspapers to be similar, it would seem the longer the agreement has been in force, the more likely the effect is to take place. Since these two newspapers make up the oldest JOA, it would seem that they would have become more alike than any other JOA pair. This is not the case in Albuquerque.

TABLE 6

COMPARISON OF THE ALBUQUERQUE JOURNAL AND ALBUQUERQUE TRIBUNE[a]

Content Measure	Total Square Inches		Percent of Newshole	
	Journal	Tribune	Journal	Tribune
News Space Allocation				
Wire service copy	4,648	4,062	18.2	25.5
Staff copy	3,826	2,125	15.0	13.3
Copy about Albuquerque	1,754	1,247	6.9	7.8
Copy about county	156	177	0.6	1.1
Copy about a foreign country	1,332	838	5.2	5.3
Hard news copy	2,913	2,162	11.4	13.6
Photographs and other visuals	4,215	1,882	16.5	11.8
	Number of stories		Average square inches	
Hard news stories	170	171	17.0	13.0
All stories in news section	465	408	21.0	16.0
Editorial and Op Ed Space Allocation				
Content Measures	Total Square Inches		Percent of Editorial and Op Ed pages	
	Journal	Tribune	Journal	Tribune
Letters to the editorial and guest editorials	281	101	15.0	7.1
Syndicated or staff columns	1,028	682	54.5	47.9
Cartoons	246	313	13.2	22.0
All editorials	316	326	17.3	22.9
Editorials about Albuquerque	86	52	4.6	3.7
Editorials about the county	10	14	0.5	1.0
	Total Square Inches		Percent of Editorial and News Space	
All editorial and op ed material	1,871	1,422	6.6	7.8
Budget Allocation				
Content Measure	Total Square Inches		Percent of Total Space in the Newspaper	

Total newspaper space	153,972	91,117	--	--
Total space in news sections	52,143	28,230	33.9	31.0
Total space given op ed, editorial, and news copy	11,256	7,506	7.3	8.2
	Total Square Inches		Percent of News Section	
Advertising in news section	26,590	12,301	51.0	43.6
Newshole in news sections	25,553	15,928	49.0	56.4
Space given in-depth coverage	432	203	1.7	1.3
Average space per full-time reporter	311	290	--	--
	Number			
Full-time staff reporters	31	22		
Wire services	5	4		

Note: Chi-square was used to test the probability that the distribution within six coding categories was due to chance. Of the four news categories, source, subject, type and length, only source was significant at the $p < .05$ level. Of the two editorial page categories, type of material and subject of editorials, the former was significant at the $p < .10$ level.

[a] The average daily circulation for the Journal in 1985 was 99,293, while the circulation for the Tribune was 44,219, according to 1985 Editor & Publishers International Yearbook.

The Tribune had much less space than did the Journal. This is attributable to the latter newspaper having more than twice the circulation of the former. The Tribune had a newshole of only 15,928 square inches compared to a newshole of 25,553 square inches in the Journal. Despite the Tribune giving less total newspaper space to news and editorial copy than the Journal, the former gave a higher proportion of its total newspaper space to news and editorial copy with 8.2 percent compared to 7.3 percent for the Journal.

There was some difference between the two newspapers in news section allocation. The Tribune had a higher percentage of its news section given to wire service copy, although the Journal actually had a larger amount of square inches. The Tribune had a smaller proportion of its new section filled with staff copy, but it had a larger proportion devoted to copy about Albuquerque and the county in which Albuquerque is located. The Tribune contained a slightly higher percentage of hard news and a smaller

percentage of visual material than did the Journal. Stories in the Tribune were shorter than those in the Journal.

The news allocation process at the Tribune tended to be more locally oriented with a higher emphasis on wire service copy and hard news. The Journal was much more visual and had longer stories. It tended to be more oriented toward state, national and regional news. Of the four chi-squares for the news allocation process, only the distribution among sources of news proved to be statistically significant at the $p < .05$ level.

Table 6 also shows a difference between the newspapers in allocation of editorial and op ed space. The Journal had more space devoted to editorial and op ed matter, but the Tribune had a larger proportion of its news and editorial space allocated to this type of material. The Journal allocated 281 square inches, or 15 percent of its editorial and op ed pages, to letters to the editor and guest columns, while the Tribune gave only 171 square inches, or 7.1 percent, of its editorial and op ed space to similar material. The Journal depended more on syndicated columns, 54.9 to 47.9 percent, but the Tribune used more cartoons, 22 to 13.2 percent. Even though the Tribune was smaller, it gave more square inches, 316 to 326, to editorials than did the Journal. The latter paper, however, gave more space to editorials about Albuquerque.

For the constructed week, the Journal's editorial pages were more open to outside sources, but the Tribune had more editorials. When it came to other material on the editorial pages, the Tribune was more dependent on cartoons, while the Journal was more dependent on syndicated columns. However, these distributions found in the constructed week could have been due to chance when considered as a sample for November. Only the chi-square for the editorial subject distribution reached significance at the $p < .10$ level.

The budget allocation process showed some differences, but perhaps fewer than in the other two categories. As mentioned, the Journal had more total space for the newspaper, news section, newshole, and advertising in the news section. The Tribune, on the other hand, had more news and editorial copy and a higher percentage of their new section given to the newshole. The Journal had more in-depth coverage and a higher proportion of the news section given such coverage. It also had more reporters, 31 versus 22, and one more wire service than did the Tribune. Although the Journal had more reporters, the Tribune actually had fewer square inches per reporter than did the Journal. This indicates a substantial investment in reporters by a smaller newspaper.

Even though the Journal is a larger newspaper with more advertising, it appears the Tribune was making an effort to keep up as best it could in allocating a higher proportion of scarce

resources to news. It carried only one less wire service and actually had more reporters per space than did the Journal. The Tribune was also running a greater percentage of its total newspaper in news and editorial material, which indicates an investment in money to carry additional pages.

Overall, Albuquerque had two different newspapers for the constructed week in November. Although the differences were not great, there were enough differences in the way the two allocated space to conclude the readers had an option. As a representative sample for the month, only the distribution among sources and editorial subjects were probably not due to chance.

Knoxville Journal and News-Sentinel

As with Albuquerque and San Francisco, one of the newspapers in Knoxville dominates the circulation in the city. Table 7 shows the News-Sentinel had 104,542 average daily circulation in 1985 compared to 60,219 for the Journal. The News-Sentinel had 106,362 square inches of space in its newspapers during the constructed week in November, while the Journal had 69,003 square inches. The newshole for the News-Sentinel was 16,052 square inches, compared to 10,368 for the Journal. This represented 48 and 49.9 percent of the news sections, respectively.

TABLE 7

COMPARISON OF THE KNOXVILLE JOURNAL AND KNOXVILLE NEWS-SENTINEL[a]

	News Space Allocation			
Content Measure	Total Square Inches		Percent of Newshole	
	Journal	News-Sen.	Journal	News-Sen.
Wire service copy	2,678	3,043	25.8	19.0
Staff copy	1,504	2,997	14.5	18.7
Copy about Knoxville	954	1,667	9.2	10.4
Copy about county	339	310	3.3	1.9
Copy about a foreign country	466	587	4.5	3.7
Hard news copy	2,817	2,278	27.2	14.2
Photographs and other visuals	1,670	2,635	16.1	16.4
	Number of stories		Average square inches	
Hard news stories	157	195	18.0	12.0
All stories in news section	296	501	15.0	13.0

Editorial and Op Ed Space Allocation

Content Measures	Total Square Inches		Percent of Editorial and Op Ed pages	
	Journal	News-Sen.	Journal	News-Sen.
Letters to the editorial and guest editorials	203	287	16.3	18.7
Syndicated or staff columns	591	732	48.6	47.8
Cartoons	385	170	31.1	11.2
All editorials	173	341	14.0	22.3
Editorials about Knoxville	25	50	2.0	3.3
Editorials about the county	21	00	1.7	0.0
	Total Square Inches		Percent of Editorial and News Space	
All editorial and op ed material	1,234	1,530	10.2	8.3

Budget Allocation

Content Measure	Total Square Inches		Percent of Total Space in the Newspapers	
Total newspaper space	69,003	106,362	--	--
Total space in news sections	20,757	33,444	30.1	31.4
Total space given op ed, editorial, and news copy	5,373	7,700	7.7	7.2
	Total Square Inches		Percent of News Section	
Advertising in news section	10,389	17,392	50.1	52.0
Newshole in news sections	10,368	16,052	49.9	48.0
Space given in-depth coverage	00	302	0.0	1.9
Average space per full-time reporter	266	235	--	--
	Number			
Full-time staff reporters	17	27		
Wire services	1	5		

Table 7 - Continued

Note: Chi-square was used to test the probability that the distribution within six coding categories was due to chance. Of the four news categories, source, subject, type and length, only type of coverage (hard news, in-depth or other) was significant at the $p < .001$ level. Of the two editorial page categories, type of material and subject of editorial, the former was significant at the $p < .01$ level and the latter at the $p < .005$ level.

[a] The average daily circulation for the Journal in 1985 was 60,219, while the circulation for the News-sentinel was 104,542, according to 1985 Editor & Publishers International Yearbook.

Just as with the other two cities, the two Knoxville newspapers showed some differences in the way they allocate their news space. The Journal gave a higher proportion of its news section to wire service copy, 25.8 percent to 19 percent, and a lower proportion to staff copy, 14.5 to 18.7 percent, when compared to the News-Sentinel. The Journal gave a smaller percentage of space to copy about Knoxville, 9.2 to 10.4, and a higher percentage of space to news about the county, 3.3 to 1.9, than did its competitor. The Journal was also more hard news oriented and had fewer but longer stories than did the News-Sentinel.

Overall, the Journal stressed longer, harder news stories with more wire service and county news than did the News-Sentinel, while the News-Sentinel tended to run shorter stories prepared by its staff. The only statistically significant relationship among the news allocation procedures was in the type of coverage, which was significant at the $p < .001$ level.

The differences in how the Knoxville newspapers distributed their editorial and op ed space was noticable different. The larger newspaper, the News-Sentinel, had more space given all editorial and op ed material, 1,530 versus 1,234 square inches, but the Journal had a greater percentage of total news and editorial op ed space given its editorial material, 10.2 versus 8.3 percent. There was a slight difference in space given to letters to the editor and guest columns and space given to columns, but there was a greater difference in space given to cartoons and editorials. The Journal gave 31.2 percent of its editorial and op ed pages to cartoons, compared to 11.1 percent for its competitor. The Journal gave only 14 percent, or 173 square inches, of its editorial and op ed space to editorials, while the News-Sentinel gave 22.3 percent, 341 square inches, to editorials. The Journal editorialized more about issues involving the county, but the News-Sentinel gave more space, 50 to 25 square inches, to issues about the city of Knoxville.

The News-Sentinel had much more variety in its editorial and op ed pages than did the Journal. The latter newspaper gave 80 percent of such pages to columns and cartoons, while the News-Sentinel gave only about 60 percent of space to these two categories. The News-Sentinel was more open to outside sources and was more active in editorializing than was its competitor The chi-square for distribution among types of material on the editorial page was significant at the $p < .01$ level, and the distribution among subject was significant at the $p < .005$ level.

A few of the catgories in the budget allocation process differed for the two newspapers. The Journal had no in-depth coverage during the week studied, while the News-Sentinel had 302 square inches, or 1.9 percent of its newshole given to investigative stories, news analysis, or series. The Journal had fewer reporters and more squre inches of copy per reporter than did its competitor, but the difference in the latter category was only 31 square inches. The Journal carried only one wire service, but the News-Sentinel carried five.

Although the percentage of space given to advertising, newshole and total copy were almost equal, there was a difference in allocation of funds for staff and wire services. The News-Sentinel was more committed to getting several sources of news through a slightly larger staff and more wire services. It was also committed to more in-depth stories, despite having shorter stories overall. The difference between the two Knoxville newspapers in money allocation runs counter to the differences found in San Francisco and Albuquerque. The almost equal distribution of space for newshole also differs from the two cities previously examined. Usually the newspaper with less circulation will devote a noticeably larger portion of its total space to its newshole.

As with the previous two examples, there were enough differences between the way the two Knoxville newspapers allocated their resources to indicate that readers had different types of newspapers at their disposal during the constructed week. The Journal had a higher percentage of hard news and wire copy with longer stories. The News-Sentinel, with more wire services, more in-depth coverage, and a larger staff, offered the reader more sources of news with an occasional in depth examination of events and issues. Distinct differences existed in how the two newspapers allocated editorial space. Generalizing to the entire month, however, there was little difference in news allocation, but a great difference in editorial and op ed page allocation.

Charleston Gazette and Daily Mail

The two Charleston newspapers do not have the great difference in circulation found in the other three cities. Table 8 shows the Gazette led in 1985 with an average daily

circulation of 62,175, while the trailing Daily Mail had an average daily circulation of 52,993. The total amount of space given to news and editorial copy was about the same, with the Gazette having 6,919 and the Daily Mail having 6,010 square inches. The total square inches in the newspapers were slightly different, with the Gazette having 61,328 and the Daily Mail having 55,900 square inches. The newshole was larger in the Gazette, which gave 13,079 square inches or 50.4 percent of its news section, compared to the Daily Mail, which gave 10,600 square inches or 45.1 percent of its news section to the newshole.

The difference in the news space allocation between the two Charleston newspapers was considerably smaller than the difference between the other three sets of newspapers studied here. Percentages of newshole given to copy about foreign countries, hard news and copy about the county were almost the same. The Gazette gave a slightly lower proportion of its newshole to wire copy, 25.8 to 28.3 percent, and to staff copy, 13.9 to 18.1 percent. The Gazette included more visual elements than did the Daily News, but the average story length and number of stories were almost equal. Surprisingly, the Daily Mail, which was smaller, exceeded the total square inches given to stories about Charleston and had a higher percentage of newshole devoted to such, 7.4 versus 4.5 percent.

Overall, the two newspapers where fairly close in allocation of news space. The major difference was that the smaller newspaper, the Daily Mail, had more square inches of staff prepared copy and copy about Charleston than did the larger newspaper. This was true despite the Gazette having a larger staff. A Charleston reader wanting more news about his city would have done better going to the Daily Mail. This does not mean the Daily Mail had better stories, just more. The difference was not statistically significant as a representation of November.

Just as with the previous sets of JOA newspapers, the allocation of editorial and op ed space showed a greater difference than did the news allocation process. The Gazette had considerably more space and a higher proportion of space, 24.7 versus 11.5 percent, devoted to letters to the editor and guest columns than did the Daily Mail. The Daily Mail had a higher proportion of space given to columns, cartoons and editorials. Neither of the newspapers was overwhelmingly local in its editorials, but the Gazette did give 1.9 percent of its editorial and op ed space to city editorials, compared to zero percent by the Daily Mail. The latter paper gave a higher proportion to county editorials.

The differences found in the editorial and op ed pages not only applied to the constructed week, but also were statistically

significant as a sample for November. The distribution among types of editorial material was significant at the $p < .10$ level, while the distribution among editorial topics was significant at the $p < .001$ level.

There was not a great deal of difference in the budget allocation process. There was little difference in the proportion of space given the news section, all editorial and news copy and the newshole. However, the Daily Mail had no in-depth coverage during the week considered, while the Gazette gave 1.2 percent of its newshole to in-depth coverage. Neither newspaper had invested in many wire services, and there was a difference of only five full-time reporters. The difference in allocation for reporters showed up in the square inches per reporter. The Gazette had only 289 square inches per reporter, versus 372 for the Daily Mail. This difference, plus the fact that there was little actual difference in square inches of staff copy carried, explains why the Gazette had more in-depth coverage.

Overall, the two Charleston newspapers varied slightly in news allocation and greatly in editorial and op ed space allocation for the week considered. There was more of a commitment to staff and in-depth coverage by one of the newspapers. As a representative sample, the editorial and op ed space allocation was statistically significant and indicates the readers in Charleston had two distinct editorial and op ed sections to select from during November.

Summary

Considering just the issues examined for the constructed week, all pairs showed some differences in news space and editorial op ed space allocation. The differences were not as great in the news sections as in the editorial sections. When considered as a sample for the month of November, the differences in the news space distributions were too slight in most cases to conclude they were not due to chance. However, three of the four pairs did have one of four news distribution categories that were statistically significant. With editorial content categories, three of four newspaper pairs showed statistically significant differences in both editorial distribution categories. In the other case, one of the two was significant at the $p < .10$ level.

The budget allocation process did not show a great deal of variance in most pairs. Commitment to staff and wire services was fairly consistent. In Knoxville, one paper had a greater number of wire services, and in Charleston, one newspaper had a larger reporting staff.

The small differences were not surprising because of the nature of JOA newspaper markets. They must compete for readers because profit distribution is often tied to circulation. This means the individual newspapers must be a substitute for the

competing newspapers, while at the same time a differentiated product. It appears the JOA newspapers studied here were fairly good substitutes for each other in the news pages, although there were some slight differences, while differentiating themselves primarily in the editorial and op ed section.

Since this study did not examine the content of individual stories, it is inappropriate to conclude the editorial voices were entirely different in these JOA markets, but there is evidence that these pairs differed in their emphasis on types of editorial and op ed material and in the subject matter of editorials. The slight differences in news distribution add to the conclusion here that the four pairs of JOA newspapers examined here offered the readers in their cities different products, at least during the month of November 1984.

Conclusions

The purpose of this chapter was to review the debate about joint operating agreements in light of 15 years of experience and to present empirical evidence concerning the underlying assumption that joint operating agreements will preserve a second editorial voice in the city in which it is in effect. An examination of events in the newspaper industry since 1970 shows support for two of the five main arguments advanced by opponents to the Newspaper Presevation Act. JOA newspapers may well charge monopoly prices for advertising. They may well be a high barrier to entry in a market, although the barrier may be more a function of the size of the market than the fact that the market has a JOA.

Evidence does not support the other three arguments against JOAs. First, the act is constitutional, according to the judicial system. Second, few cities can support more than one newspaper for an extended period of time due to economies of scale and the circulation spiral. Third, there is evidence that JOAs do not interfere any more than competitive newspapers with suburban newspaper development.

The fact that the Newspaper Preservation Act led to some actions that would have otherwise been in violation of the antitrust laws is not a matter of dispute. Proponents of the act admitted before the law was passed that this might happen. The key to the whether the Newspaper Preservation Act should have been passed and should continue to exist is whether the people who live in cities with JOAs are benefiting from such agreements. The evidence presented here would indicate that readers in JOA markets are getting newspaper products they would not have without the JOAs.

Newspapers produced under joint operating agreements are more similar to competitive newspapers than to monopoly newspapers in the way they spend money and allocate news space. While they are not exactly like competitive papers, the difference is less than

the difference between JOA newspapers and monopoly newspapers. This study also suggests that in at least four of the 22 JOA markets for the period in this analysis the readers had a choice between two different editorial op ed sections and occasionally between two slightly different new sections.

The fact that these differences between pairs of JOA newspapers and among newspapers facing different market structures were not greater should not be surprising or considered an argument against the importance of JOAs. Journalism education, group ownership and professional norms, often work to make newspapers similar. The point is that the Newspaper Preservation Act has preserved two newspapers for readers where there might have only been one, and it has created newspapers that spend more money on the product than do monopoly newspapers. Since the circulation of JOA newspapers comprises 7.8 percent of total daily circulation in this country, the overall impact is important.

As with all studies, this one has limitations. The quality of content in the newspapers was not examined. Any conclusion about quality of any of these types of newspapers would be inappropriate. Additional studies in this area would be beneficial. The effect of circulation on the differences between JOA and competitive newspapers was not examined. This was not done because of limitations in the sample and statistical method, and also because differences in population are interwoven with the differences in type of market structure in the population.

Even though the Newspaper Preservation Act has had some success, modifications to the act that would open up entry into the market would be consistent with the spirit of the act. Such modifications have already been suggested. Owen (1975) said the means of producing newspapers should be separated from the editorial staffs of newspapers to break up the economies of scale enjoyed by large newspapers. The Newspaper Preservation Act did this but went further to separate the advertising, distribution and business departments of the newspapers. Reuniting the advertising and business departments with the editorial departments, while keeping production and distribution separate, might work to further make JOA newspapers similar to competitive newspapers.

A second modification would follow similar lines of breaking up vertical integration. Currently, joint operating agreements are limited to two newspapers. If JOAs were opened up to third newspapers in conjunction with the separation of advertising and business departments, entry into markets might be encouraged. This option was suggested by Humphrey (1970-71). If a company did not have to make the huge capital investment necessary to buy printing equipment, more dailies might start. Giving new dailies access to printing equipment under JOAs might be a way to help in this area.

The Newspaper Preservation Act has been at least partially successful in accomplishing what its sponsors wanted it to do. The cost has been higher advertising prices, which ultimately means higher prices for goods. The important questions now are whether fine tuning the act will help bring the benefits while lowering the costs and whether such tuning will encourage entry into markets with already high barriers.

FOOTNOTES

[1] The budget allocation process was found through factor analysis to have two components; one involved space devoted to news and editorial material versus advertising, and the other dealt with editorial matters such as numbers of staff and wire services. The factor analysis also found three out of four types of editorial material had high loadings on one factor. The content measures assumed to be associated with the news space allocation process were spread through three different factors. These three factors did not share loadings with the other allocation processing factors and together accounted for less than 20 percent of the variance. A seventh factor loaded on only two variables, length of hard news stories and length of all news stories.

[2] Nine content measures relating to the news allocation process, seven content measures relating to editorial allocation process, and three content measures relating to the budget allocation process were included in the content analysis. These are listed in tables 2 and 3. In addition, the number of full-time reporters and number of wire services were measured. The number of full-time reporters was based on the number of different bylines carried during the constructed week. In order to adjust for the varying size of newspapers, the total square inches of copy in the newshole was divided by the number of full-time reporters. This average space per reporter gives an indication of the amount of emphasis the news organization put on quantity of staff work. The number of wire services came from the 1984 Editor & Publisher International Yearbook. This figure includes the major wire services, such as AP and UPI, but it also included other services, such as The New York Times service and those owned by groups.

Five coders analyzed the content of newspapers from a constructed week in November. The dates were November 10, 11,

13, 15, 19, 23 and 28. These coders were all asked to code the same newspaper at the beginning of the process and another newspaper issue after they were well into the coding. The average agreement for the categories when comparing the coders in pairs for the first coder-reliability check was about 81 percent for the news and editorial categories. Average agreement for news categories in the second check was about 85 percent and for editorial categories it was 100 percent. Using a formula to determine the probability that the agreement occurred by chance (Krippendorf, 1980), the average probability that the news categories were not by chance was 71 percent. The range was from 41 to 93 percent probability. There was an average of 85 percent probability that the agreement on editorial coding was not due to chance.

[3] Source of news was divided into staff, wire and syndicated services and other. Subject of news was divided into city in which the newspaper is located, county in which the newspaper is located, foreign, and other. Other included state, regional and national news. Type of coverage included hard news, which was defined as conflict oriented coverage, in-depth news, which included news analysis, series of related stories and investigative reports, and other. Length of story was the square inches per story.

[4] Type of editorial material was divided into editorials, syndicated or staff columns, letters to the editor and guest columns, and cartoons. Editorial subjects were either about the city in which the newspaper is located, about the county in which the newspaper is located, or other. The emphasis in coding was placed in local editorials because of the limited outlets for such editorials in local markets.

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TABLE 8

COMPARISON OF THE CHARLESTON GAZETTE AND CHARLESTON DAILY MAIL[a]

	News Space Allocation			
Content Measure	Total Square Inches		Percent of Newshole	
	Gazette	Daily Mail	Gazette	Daily Mail
Wire service copy	3,370	2,996	25.8	28.3

Staff copy	1,818	1,923	13.9	18.1
Copy about Charleston	586	787	4.5	7.4
Copy about county	240	193	1.8	1.8
Copy about a foreign country	829	626	6.3	5.9
Hard news copy	2,244	1,787	17.2	16.9
Photographs and other visuals	1,696	1,210	13.0	11.4
	Number of stories		Average square inches	
Hard news stories	145	117	15.0	15.0
All stories in news section	313	302	18.0	17.0

Editorial and Op Ed Space Allocation

Content Measures	Total Square Inches		Percent of Editorial and Op Ed pages	
	Gazette	Daily Mail	Gazette	Daily Mail
Letters to the editorial and guest editorials	428	118	24.7	11.5
Syndicated or staff columns	671	477	38.8	46.6
Cartoons	308	228	17.8	22.3
All editorials	324	200	18.7	19.6
Editorials about Charleston	33	00	1.9	0.0
Editorials about the county	16	39	0.9	3.8
	Total Square Inches		Percent of Editorial and News Space	
All editorial and op ed material	1,731	1,023	11.1	8.5

Budget Allocation

Content Measure	Total Square Inches		Percent of Total Space in the Newspapers	
Total newspaper space	61,328	55,900	--	--
Total space in news sections	25,968	23,478	42.3	42.0
Total space given op ed, editorial, and news copy	6,919	6,010	11.3	10.7
	Total Square Inches		Percent of News Section	
Advertising in news section	12,889	12,878	49.6	54.9
Newshole in news sections	13,079	10,600	50.4	45.1

Space given in-depth coverage	162	00	1.2	0.0
Average space per full-time reporter	289	372	--	--
		Number		
Full-time staff reporters	19	14		
Wire services	2	1		

Note: Chi-square was used to test the probability that the distribution within six coding categories was due to chance. Of the four news categories, source, subject, type and length, none were significant at the $p < .05$ level. Of the two editorial page categories, type of material and subject of editorial, the former was significant at the $p < .10$ level and the latter at the $p < .001$ level.

[a] The average daily circulation for the Gazette in 1985 was 62,175, while the circulation for the Daily Mail was 52,993, according to 1985 Editor & Publishers International Yearbook.

U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

JUL 22 1986

Honorable Strom Thurmond
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This letter is in response to your request for the views of the Department of Justice on S. 2314, a bill to amend the Newspaper Preservation Act. This bill is apparently intended primarily to expand the antitrust exemption provided to newspaper joint operating arrangements (JOAs) by that Act so as to protect so-called "total market coverage" distribution of part of newspaper publications, as well as electronic publication activities. The Department recommends against enactment of this bill as introduced; however, the Department would not oppose legislation that (1) adjusted the definition of the activities that may be conducted by an exempt JOA to include the distribution of part of a newspaper publication, (2) made clear that conduct that is not exempt as part of a JOA but is reasonably ancillary to the business of publishing the newspapers involved in the JOA is to be analyzed under the antitrust rule of reason, and (3) made clear that joint newspaper-related activity beyond the protection of the Act's exemption is not made unlawful by the Act itself.

Summary of the Legislation

S. 2314 would amend the definition of "newspaper publication" in the Newspaper Preservation Act 1/ and would add a sentence to the Act regarding the scope of activities that may be lawfully engaged in by participants in a joint operating arrangement. The bill would have the effect of expanding the scope of exempt JOA activities to include certain so-called total market coverage ("TMC") publications and electronic

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1/ 15 U.S.C. §§ 1801-1804.

publication. 2/ Under the bill, the joint provision of certain TMC or electronic distribution could not be attacked as a violation of the antitrust laws, but predatory conduct by the JOA could be challenged.

S. 2314 would amend the definition of "newspaper publication" in 15 U.S.C. § 1802(4) in two ways. First, the requirement of publication on "newsprint paper" would be deleted. This would enable JOAs to utilize improved resolution paper and to engage in some types of electronic publication while staying within the Act's antitrust exemption. 3/

Second, the bill would alter the requirement in the Act that a substantial portion of the content of a "newspaper publication" be devoted to news and editorial opinion by requiring only that such publication be "delivered in whole or in part to readers and in which whole publication" a substantial portion of the content is devoted to news and editorial opinion. Under the Act as thus amended, a JOA could distribute part of a JOA newspaper using TMC, and the joint TMC activity would be within the Act's exemption regardless of the content (e.g., advertising) of that part. 4/

The bill also would add after the first sentence in 15 U.S.C. § 1803(c) the following: "Nor shall anything in this Act be construed to make unlawful under any antitrust law any activity undertaken by a party to a joint newspaper operating agreement in connection with a newspaper publication that could be engaged in lawfully if such person were not a party to such an agreement." This change appears intended to prevent courts from reading the Newspaper Preservation Act as making unlawful any conduct by a JOA participant that does not fit within the Act's definition of a JOA.

2/ "Total market coverage" is a term used to describe distribution of material to everyone within a specific geographic area, such as a city or zip code. "Electronic publication," as used herein, would involve making available to computer terminals in homes or offices all or part of newspapers or data from newspapers.

3/ This change would also appear to bring weekly magazines within the definition of "newspaper publication," thereby enabling such magazines to qualify for the Act's antitrust exemption. We do not believe this effect to have been intended by the draftsmen.

4/ Similarly, the JOA could distribute part of a JOA newspaper electronically.

Effect on Existing Law

S. 2314 would change existing law by exempting from scrutiny under the antitrust laws certain joint conduct engaged in by participants in otherwise lawful JOAs--in particular, joint conduct involving certain TMC publishing and electronic publication.

The Newspaper Preservation Act is solely an antitrust-exemption statute. It does not itself create any legal prohibitions, but merely exempts certain conduct from scrutiny under the antitrust laws when the prior approval of the Attorney General has been obtained. Newspaper Guild v. Levi, 539 F.2d 755 (D.C. Cir. 1976), cert. denied, 429 U.S. 1092 (1977). 5/ Accordingly, joint activities by JOA participants that do not fit within the confines of the Act's JOA exemption are neither provided an antitrust exemption by the Act nor made illegal by the Act. Thus, such joint involvement in electronic publication and TMC (where the TMC publication does not come within the Act's exemption) is neither exempt from the antitrust laws nor made illegal by the Act. Instead, such joint activities are subject to the antitrust laws.

In general, such joint activity as electronic publication and TMC would be analyzed under the antitrust laws as a joint venture. The antitrust laws recognize that some limitations on competition between members of a venture may enhance overall competition and consumer welfare by, inter alia, facilitating the provision of a new or different product to the public (see Broadcast Music Inc. v. CBS, 441 U.S. 1 (1979)), in competition with products produced by those outside the venture. Such analysis thus takes proper account of the presence of actual or potential competition and of any integrative efficiencies. At the same time, general joint venture analysis recognizes that, depending on the circumstances, unnecessary elimination of competition among the members of a venture can harm consumer welfare.

We are aware of one judicial decision under current law that, instead of applying this type of antitrust analysis, used an analysis that would condemn as illegal per se at least some

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5/ A literal reading of 15 U.S.C. § 1803(b) ("It shall be unlawful . . .") would make JOA conduct illegal where the JOA has neither been grandfathered under § 1803(a) nor received the Attorney General's prior approval. The D.C. Circuit in Newspaper Guild rejected such a literal reading of the Act as being inconsistent with congressional policy underlying the Act.

joint publication activities by JOA participants that are not protected by the Act's exemption of their JOA. See Wick v. Tucson Newspapers, Inc., 598 F. Supp. 1155 (D. Ariz. 1984, Supplemental Opinion 1985) (a challenge to efforts of parties to the Tucson JOA to engage in TMC through the JOA). 6/ Despite Wick, the Department believes that under current law such joint conduct should and would be analyzed under joint venture principles. 7/

S. 2314 would thus change current law by exempting from the antitrust laws certain conduct that is presently subject to the type of antitrust analysis described above. One change, the deletion of the requirement of publication on "newsprint paper," would enable JOAs to utilize improved resolution paper and to engage in electronic publication of newspapers while clearly staying within the Act's antitrust exemption.

The bill's other change in the definition of "newspaper publication" would have the effect of bringing within the Act's exemption joint activity by JOA participants involving TMC distribution of part of a JOA newspaper regardless of the content of that part. Courts would no longer focus on whether the TMC publication standing alone constituted a "newspaper publication" as did the court in Wick, but instead on whether it was part of a "newspaper publication."

It is not clear whether or how the language that the bill would add to 15 U.S.C. § 1803(c) would change existing law. While the language apparently is intended to prevent courts from reading the Act as itself making any conduct illegal, the Act already has been so construed in Newspaper Guild.

6/ The court in Wick apparently used this analysis because it (1) viewed joint conduct such as that at issue in Citizen Publishing v. United States, 394 U.S. 131 (1969), as being illegal per se after Citizen Publishing; (2) viewed the Act as exempting some such joint conduct under certain conditions; and (3) viewed all other conduct that looks like JOA conduct but has not been exempted as remaining illegal per se. See 598 F. Supp. at 1159. The court may also have been influenced by the fact that the Tucson JOA involved in the case was the JOA that prior to passage of the Act had been held to violate the antitrust laws by the Supreme Court in Citizen Publishing.

7/ The Supplemental Order in Wick found that the TMC publication that actually was being distributed contained substantial news and editorial opinion and thus was a "newspaper publication" within the meaning of the Act, and the preliminary injunction that had been issued against the defendants was terminated. See 598 F. Supp. at 1164.

Discussion

The basic notion underlying the Newspaper Presevation Act is that commercial competition between two newspapers should be sacrificed when that appears to be necessary to save one of the newspapers from failing. 8/ Thus, editorial competition (at least to the extent that readers continue to have available two editorial products, albeit with limited incentive for the producers of those products to compete vigorously with each other) is preserved at the expense of commercial competition. The Act assumes that substantive antitrust analysis, notwithstanding its attention to the economic condition of the parties to a JOA, might prevent this result.

Once two newspapers have merged all but their editorial operations in a JOA, questions arise as to how to treat joint activities by the JOA participants, such as certain TMC and electronic publication, that arguably do not currently fit within the Act's definition of a JOA. There are three basic ways of viewing such conduct. First, the conduct could be viewed as unlawful per se. This result could be reached either by erroneously reading the Act to make any newspaper-related joint conduct outside of the permitted JOA automatically illegal or by what we believe would be a misapplication of substantive antitrust law. Secondly, the conduct could be analyzed under the joint venture/rule of reason analysis described above. Finally, the conduct could be viewed as lawful per se. This result could be achieved by amending the Act to bring the conduct within the Act's antitrust exemption.

The Department believes generally that joint activities of JOA participants that are reasonably ancillary to their joint publication of newspapers, but that do not fit within the Act's current definition of a JOA, should be neither legal per se nor illegal per se, but should be evaluated under joint venture/rule of reason analysis. 9/ We recognize, however, that Congress may, in keeping with the basic notion underlying the Act, want to fine-tune the scope of the exemption so as to bring within the exemption activities that have become part and parcel of the business of publishing a newspaper. Decisions on how to distribute all or part of newspapers--including decisions on whether and how to employ total market coverage--can be viewed as part and parcel of the business of

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8/ See S. Rep. No. 535, 91st Cong., 1st Sess. 2-3 (1969).

9/ The Department does not mean to suggest that if the participants in a JOA or in any other lawful venture engage in a "naked restraint," a per se violation should not be found.

newspaper publishing. 10/ Accordingly, while the Department believes that joint activities of JOA participants in distributing all or part of the JOA newspapers through TMC can readily be analyzed under joint venture/rule of reason analysis, the Department would not oppose legislation that simply and directly brings such activities within the Act's exemption and thereby treats such activities the same as other non-editorial aspects of the newspaper business. 11/

Although the Department does not oppose bringing within the Act's exemption activities that are clearly part and parcel of the business of publishing a newspaper, we do oppose bringing within the exemption other activities that, while perhaps related to the business of newspaper publishing, are not plainly part and parcel of that business. In particular, on the present record, joint efforts by JOA participants to engage in electronic publication should be evaluated under traditional joint venture/rule of reason analysis. Such analysis can take proper account of the presence of actual or potential competition and of any integrative efficiencies.

Unlike TMC, electronic publication of material currently found in newspapers has not yet moved far beyond the experimental stage. It is not possible to do much more than speculate as to the types of products and services that will be offered, and by whom. Accordingly, it is impossible to predict how closely related electronic publication will ever be to the business of publishing what we now know as newspapers. It is similarly impossible to assess at this juncture the types and magnitude of economies of scale and scope that may develop. In particular, there is no reason to assume that electronic publication will have the same types of characteristics (e.g., evening edition handicaps, economies of scale in print) that have been cited as leading to the demise of daily newspaper competition in many cities. With such limited knowledge about

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10/ TMC distribution is an established practice and is used both by newspapers and by others. According to the 1985 Editor and Publisher International Yearbook, eleven JOAs were at that time involved in TMC programs.

11/ This could be accomplished by amending the definition of "joint newspaper operating arrangement" in 15 U.S.C. 1802(2) to add immediately after the first usage of the word "distribution" the following: "of all or part of such newspaper publications". While such an amendment would bring TMC distribution of all or part of a JOA newspaper within the Act's exemption, under 15 U.S.C. § 1803(c), conduct within the Act's exemption remains subject to challenge as a predatory practice.

the economics of electronic publication, there seems to be insufficient reason to grant to JOA participants an antitrust exemption covering such activities at this time. Should the Committee believe that it is necessary to make clear that the rule of reason is the correct antitrust treatment for electronic publication or other activities closely related to the business of publishing the JOA newspapers, the Department would not oppose an appropriate clarification. 12/

Finally, with regard to making clear that the Act does not create any new legal prohibitions, the Department would not object to legislation making clear that joint newspaper-related activity beyond that protected by the Act's JOA exemption is not made unlawful by the Act itself, thus codifying the D.C. Circuit's holding in Newspaper Guild. 13/ We do not believe, however, that the language that S. 2314 would add to 15 U.S.C. § 1803(c) clarifies this point effectively. Indeed, it compounds the problem in the present wording of § 1803(b) ("It shall be unlawful . . .") instead of directly correcting it.

* * * * *

We believe that S. 2314 as introduced does not sufficiently clarify the Newspaper Preservation Act and that it expands the scope of activities exempted from the antitrust laws in some ways that have not been justified on the current record. However, the Department would not oppose legislation that, in the manner suggested above, (1) fine-tunes the scope of JOA activities that are provided an antitrust exemption so as to include TMC, (2) makes clear that conduct that is not exempt as part of a JOA but is reasonably ancillary to the business of

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12/ This could be accomplished by adding a new subsection (d) following 15 U.S.C. § 1803(c) and stating: "(d) In any action under any antitrust law challenging joint conduct between the parties to a joint newspaper operating arrangement that has received the limited antitrust exemption provided by subsection (a) or (b) of this section, joint conduct between the parties that is not exempt as part of such arrangement but that is reasonably ancillary to the business of publishing the newspaper publications involved therein shall not be deemed illegal per se; such conduct shall be judged on the basis of its reasonableness, taking into account all relevant factors affecting competition in properly defined relevant markets.".

13/ This could be accomplished by amending the first sentence of 15 U.S.C. § 1803(b) to read: "It shall not be unlawful for any person to enter into, perform, or enforce a joint operating arrangement not already in effect, provided that the prior written consent of the Attorney General has been obtained."

publishing the newspapers involved in the JOA is to be analyzed under the antitrust rule of reason, and (3) makes clear that joint newspaper-related activity beyond the protection of the Act's exemption is not made unlawful by the Act itself.

The Office of Management and Budget has advised that there is no objection to submission of this report from the standpoint of the Administration's program.

Sincerely,

John R. Bolton

John R. Bolton
Assistant Attorney General

June 23, 1986

Senator Jake Garn
United States Senate
Washington, D.C. 20510

Dear Senator Garn:

Utah Press Association strongly opposed the Newspaper Preservation Act during the 1960's. It was our position then and it remains today that no newspaper should have special operating privileges under the law. Reserving two editorial voices is only one result - throttling other potential ones is another outcome. Free, open and fair competition is the American way. Passage of S2314 would give agency newspapers an even more monopolistic position than they already enjoy with their virtual immunity from anti-trust laws. We ask that this position be made a part of the subcommittees hearings.

Sincerely,

Utah Press Association Board of Directors

Kent Fuellenbach
Payson Chronicle

Kevin Ashby
Salina Sun/Gunnison Valley News

Adrien Taylor
Moab Times Independent

Wayne Bell
Preston Citizen

Jack Wallis
Vernal Express

Sue Dutson
Millard County Chronicle/Progress

Brett Bezzant
American Fork Citizen
Lehi Free Press
Pleasant Grove Review

Allan Gibson
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